EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED. No. 86-6-CFH Title: James G. Ricketts, Director, Arizona Department of Corrections, et al., Petitioners Status: GRANTED John H. Adamson Docketed: July 3, 1986 Court: United States Court of Appeals for the Ninth Circuit Counsel for petitioner: Roberts, Jack, Schafer III, William J. Counsel for respondent: Ford, Timothy K. Entry Date Proceedings and Orders Jul 3 1986 G Petition for writ of certiorari filed. Jul 3 1986 Appendix of petitioner Arizona filed. Jul 28 1936 Order extending time to file response to petition until September 8, 1986. DISTRIBUTED. September 29, 1986 Sep 10 1985 Sep 8 1986 X Brief of respondent John Adamson in opposition filed. Sep 8 1986 6 Motion of respondent for leave to proceed in forma pauperis filed. 12 Sep 29 1986 X Reply brief of petitioner Arizona filed. 13 Oct 6 1986 Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Scalia OUT. 14 Oct 6 1986 Petition GRANTED. Justice Scalia OUT. ************************************ Nov 18 1986 D Motion of respondent to disqualify petitioner's counsel Nov 19 1986 16 DISTRIBUTED. Nov. 26, 1986. (Motion of respondent to disqualify petitioner's counsel). Joint appendix filed. Nov 20 1986 18 Nov 20 1986 Brief of petitioner Arizona filed. 19 Nov 20 1980 Brief amicus curiae of United States filed. Nov 24 1986 Record filed. Certified copy of original record and proceedings, 3 Nov 24 1986 volumes, received. Nov 22 1986 Opposition of petitioner to motion of respondent to disqualify petitioner's counsel filec. Dec 1 1986 Motion of respondent to disqualify petitioner's counsel Motion of The Solicitor General for leave to participate Dec 5 1986 G in oral argument as amicus curiae and for divided argument filed. Dec 15 1986 Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Dec 12 1986 Order extending time to file brief of respondent on the merits until January 10, 1987. Jan 10 1987 Brief of respondent John Adamson filed. Feb 6 1987 30 CIRCULATED.

SET FOR ARGUMENT. Wednesday, April 1, 1987. (4th case)

31

Feb 6 1987

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FILED

JUL 8 1986

NO. 85-___

JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

-vs-

JOHN HARVEY ADAMSON,

Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After a defendant breaches his plea agreement by refusing to testify, do double jeopardy principles prohibit the state from refiling the original charge as provided for in the plea agreement in which the defendant agreed that, if he breached the agreement, the original first-degree murder charge would be refiled and he would be subject to the death penalty?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
JUDGMENT SOUGHT TO BE REVIEWED	1
OPINION BELOW	2
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF FACTS	5
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	24
CERTIFICATION	26
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1

TABLE OF CASES AND AUTHORITIES

Cases	Page
Adamson v. Arizona 104 U.S. 204 (1983)	12
Adamson v. Hill No. 80-5941	
(9th Cir., Nov. 30, 1981)	12
Adamson v. Hill 455 U.S. 992 (1982)	12
Adamson v. Ricketts 758 F.2d 441	
(9th Cir. 1985)	13,16
Adamson v. Ricketts 789 F.2d 722 (9th Cir. 1986)	14
Adamson v. Superior Court 125 Ariz. 579	
611 P.2d 932 (1980)	24
Brown v. Ohio 432 U.S. 161 97 S.Ct. 2221	
53 L.Ed.2d 187 (1977)	16
Jeffers v. United States 432 U.S. 137 97 S.Ct. 2207	
53 L.Ed.2d 168 (1977)	20
Johnson v. Zerbst 304 U.S. 458 58 S.Ct. 1019	1
82 L.Ed. 1461 (1938)	18

Santobello v. New York 404 U.S. 257	
92 S.Ct. 495 30 L.Ed.2d 427 (1971)	19
State v. Adamson 136 Ariz. 250	
665 P.2d 972 (1983)	12,15
Sumner v. Mata 449 U.S. 539	
101 S.Ct. 764 66 L.Ed.2d 722 (1981)	22
	22
United States v. Ball 163 U.S. 662	
16 S.Ct. 1192 41 L.Ed. 300 (1896)	18,19
United States v. Barker 681 F.2d 589	
(9th Cir. 1982)	20
United States v. Dinitz 424 U.S. 600	
96 S.Ct. 1075 47 L.Ed.2d 267 (1976)	18,19
United States v. Jorn	10,19
400 U.S. 470 91 S.Ct. 547	
27 L.Ed.2d 543 (1971)	19
United States v. Scott 437 U.S. 82	
98 S.Ct. 2187	20.01
57 L.Ed.2d 65 (1978)	20,21

<u>Authorities</u>

28 U.S.C.	
§ 1254(1)	3
§ 1291	3
§ 2241	3
§ 2253	3
§ 2241 § 2253 § 2254 § 2254(d)	3,15
§ 2254(d)	22
United States Constitution	
Fifth Amendment	4,9
Fourteenth Amendment	4

JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Arizona Attorney General on behalf of the State of Arizona and James G.
Ricketts, Director, Department of
Corrections, prays that a writ of
certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on the 9th of
May, 1986, and the Motion for Rehearing denied on the 6th of June, 1986.

OPINION BELOW

The Ninth Circuit's en banc opinion, with four dissents, holding that John Harvey Adamson's voluntarily chosen course of conduct, previously determined by the Arizona Supreme Court to be a breach of his plea agreement, did not deprive him of the protection of double jeopardy, that Arizona could not try him on the original murder charge, that only an express waiver of that protection would suffice, and that, neither by the terms of the plea agreement, nor by his deliberate actions, did he surrender that protection. That opinion is Appendix A to this petition; the denial of the motion for rehearing is Appendix B.

STATEMENT OF JURISDICTION

John Harvey Adamson appealed the order of the United States District Court for the District of Arizona denying his application for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

The Ninth Circuit entered its opinion reversing May 9, 1986, and denied rehearing June 6. This petition is timely filed within 60 days of the order denying the motion for rehearing.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth

Amendment to the United States

Constitution:

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

The pertinent portion of the Fourteenth

Amendment:

[N]or shall any state deprive any person of life, liberty, or property without due process of law

STATEMENT OF FACTS

June 2, 1976, John Harvey Adamson attached an explosive device to the underside of reporter Don Bolles' Datsun, beneath the driver's seat. While he was doing this, Bolles was in the Clarendon House Hotel, lured there by Adamson in hopes Adamson would give him investigative leads in a case. Having previously examined the underside of a Datsun at a dealership, Adamson performed his grisly task expertly. After placing the bomb, he left the Clarendon and placed a telephone call to Bolles waiting in the lobby of the Clarendon. Adamson told Bolles he could not meet with him that day and they agreed to meet later. Bolles left, and as he began to back out of his parking space, the bomb was detonated by a cohort of Adamson's with a remote control device at the far end of the parking lot. The force of the

explosion literally tore Bolles apart.

He lingered for 9 days during which time three of his limbs were amputated.

Before dying, he identified a picture of Adamson as the man who made the appointment to meet him at the Clarendon House.

Armed with a search warrant, police found in Adamson's apartment materials similar to those in the bomb.

On January 15, 1977, while the jury was being chosen to try Adamson for first-degree murder, he, counseled by three attorneys, entered into a plea agreement. In exchange for his testimony and cooperation whenever needed in this and other cases — inside or outside the courtroom — the state accepted a plea to second-degree murder with a stipulated actual sentence of 20 years 2 months. That plea agreement contained provisions stating that, if Adamson breached it,

reinstatement of the original charge was automatic, the parties would be back in their original posture before the plea, and Adamson, if found guilty of first-degree murder, would be subject to the death penalty or life imprisonment.

The state trial judge painstakingly reviewed the plea agreement with Adamson in open court, almost word for word. Adamson claimed to have 4 years of college. He told the judge that he understood the agreement, had discussed it with his three attorneys, and knew that, if he breached it, he could be prosecuted for first-degree murder. The judge accepted the plea, but deferred sentencing pursuant to a provision in the agreement. Later that same year, Adamson's testimony convicted Max Dunlap and James Robison of the murder of Don Bolles. A year after that Adamson was sentenced.

In early 1980, the Arizona Supreme Court reversed the convictions of Dunlap and Robison. In preparation for the retrial, Assistant At orney General Stanley Patchell spoke with one of Adamson's attorneys, William Feldhacker, by phone to arrange an interview with Adamson. On April 3, Feldhacker wrote a letter to the Attorney General in which he said that Adamson would not testify again unless the state acceded to his "non-negotiable demands". The language made it plain that it was John Harvey Adamson conveying himself explicitly and personally through counsel. The letter also acknowledged that the state would probably consider Adamson's refusal to testify a breach of the plea agreement. Finally, Adamson wrote he was aware that a breach of the agreement by him meant that the state could prosecute him for first-degree murder and that a death penalty was possible.

Assistant Attorney General and Criminal Divison Chief Counsel, William J. Schafer III, responded by letter on April 9. He informed Adamson, through his counsel, that the plea agreement contemplated his cooperation whenever required, and that his refusal to make himself available for an interview, in preparation for the retrial, was a breach of the plea agreement that subjected him to prosecution on the original charge. The state set Adamson for a deposition but when he appeared he refused to answer questions. He claimed the protection of the Fifth Amendment. He argued that, with the April 9 letter, the state had decided that he had breached the agreement, and that, without an agreement, he could not testify.

The state then refiled the original first-degree murder charge against Adamson.

Adamson filed a motion in superior court asking that the charge be dismissed. He argued that he already stood convicted of the murder of Don Bolles. But the trial court denied his motion. He then filed a special action in the Arizona Supreme Court asking them to dismiss the new information charging him with first-degree murder. Again, he argued that he already stood convicted of the murder of Don Bolles and the refiling of the original charges was barred by the double jeopardy clause. However, when Adamson learned that the Supreme Court would not confine its examination to the question of prosecution on the original offense, but would interpret the plea agreement, he tried to withdraw his special action. However, the Arizona Supreme Court would not let him withdraw.

After oral argument on the special action, the Arizona Supreme Court issued

an opinion holding that, by the terms of the plea agreement, Adamson was obliged to cooperate and testify at a retrial, and that he had breached that agreement.

More importantly, Justice Hays said that, by the terms of the plea agreement,

Adamson had waived double jeopardy protection.

Adamson then filed a petition for habeas corpus relief in federal district court. He argued he had not breached the plea agreement. The district court, Judge Muecke, characterized Adamson's position as "legally frivolous." He termed the Arizona Supreme Court's interpretation of the plea "eminently reasonable," and concluded that Adamson, by the terms of the plea, had waived double jeopardy protections in the event of a breach.

In a memorandum decision in 1981, a panel of the Ninth Circuit affirmed,

echoing Judge Muecke's description of
Adamson's position as legally frivolous,
and the Arizona Supreme Court's
interpretation of the plea as "eminently
reasonable." Adamson v. Hill, No.
80-5941 (9th Cir., Nov. 30, 1981).
(Appendix C to this petition.) This
Court denied certiorari. Adamson v.
Hill, 455 U.S. 992 (1982).

While that one issue, breach of the plea agreement, was winding its way through the federal system, a jury convicted Adamson of first-degree murder in Tucson in October 1980. Finding two aggravating circumstances and insubstantial mitigation, the trial court imposed death. The Arizona Supreme Court affirmed. State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983). This Court denied certiorari. Adamson v. Arizona, 104 U.S. 204 (1983).

Adamson again sought federal habeas corpus relief. The district court denied it, and a panel of the Ninth Circuit affirmed in Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). He moved for rehearing en banc.

In its order granting rehearing en banc, the Ninth Circuit told the parties what issues it wanted briefed. One was the double jeopardy issue which had been decided against Adamson in 1981.

For the first time, Adamson argued in his supplemental brief on rehearing en banc that he did not understand that, if he breached the plea agreement, he could be prosecuted for first-degree murder.

With four dissenters, the Ninth Circuit held that: (1) Adamson did not expressly waive double jeopardy protection by the terms of the plea agreement, and (2) his refusal to cooperate for the retrial was

v. Ricketts, 789 F.2d 722 (9th Cir.

1986). Thus, the majority reversed this case on a point affirmed in 1981 by the same circuit, looking at the same plea agreement.

Arizona moved for rehearing, which the Ninth Circuit denied June 6, 1986.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine the following constitutional, and necessarily related, issues:

agreement signifying he understands that if he breaches the agreement by not testifying, he will be subject to prosecution on the original charge and the penalty that accompanies it, and then he deliberately breaches that agreement, does the double jeopardy clause prevent a refiling of the original charge?

2. Are determinations by a state supreme court as to what the terms of a state plea agreement mean and whether the actions of a defendant breached that agreement, findings of historical fact entitled to a presumption of correctness under 28 U.S.C. § 2254, and are such determinations matters of state law whose interpretation should be left to state courts?

Α.

Adamson's conviction of second-degree murder under the plea agreement was vacated by the Arizona Supreme Court before he went to trial on the refiled original charge of first-degree murder.

Adamson was convicted of first-degree murder and sentenced to death. State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 104 S.Ct. 204 (1983). He sought federal habeas relief, not even arguing his conviction violated double jeopardy. A panel of the Ninth Circuit

affirmed. Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). The Ninth Circuit granted rehearing en banc and told the parties to brief the settled double jeopardy issue — the law of the case since 1981. That court, split 7-4, reversed and remanded. (Opinion, Appendix A of this petition.)

The first basis for the reversal by the Ninth Circuit Court of Appeals was that Adamson could not be tried and convicted of the greater (original) charge of first-degree murder because jeopardy had. attached to his conviction for second-degree murder under the plea agreement. The majority cited Brown v. Ohio, 432 U.S. 161 (1977). But that case involved a separate prosecution for auto theft while Brown's prior conviction for joyriding was in full force. It has no applicability here, as the dissenters noted, because the Arizona Supreme Court

vacated Adamson's second-degree conviction and sentence. Adamson's agreement specifically provided that if he breached, the parties would be returned to their original positions before the plea and he could be prosecuted for open murder (which includes both first and second-degree) and be subject to the death penalty. (Opinion, Appendix A, paragraphs 5, 15.) The majority of the Ninth Circuit Court simply ignored the Arizona Supreme Court's vacation of the conviction for second-degree murder. It should not have.

В.

There is no requirement that in waiving double jeopardy rights a defendant must use the phrase "double jeopardy."

Although they declined to decide whether jeopardy can be waived, the majority held that any waiver had to be

express, not implied, citing Johnson v.

Zerbst, 304 U.S. 458 (1938), and

concluded that because neither Adamson

nor the plea agreement used the phrase

"double jeopardy," Adamson did not waive

these rights. This is plainly wrong

under this Court's precedents, and even

those of the Ninth Circuit.

This Court has said that double jeopardy protection is not the same kind of constitutional right as, for example, the right to counsel, and has implicitly rejected the contention that it must be expressly waived. United States v. Dinitz, 424 U.S. 600, 609 n.11 (1976). Long ago, this Court held that a defendant who successfully appeals his conviction has no double jeopardy objection because his action in appealing the conviction necessitated a new trial. United States v. Ball, 163 U.S. 662, 671-72 (1896). Nobody had to explain

double jeopardy to Ball before he appealed, or forewarn him he could be retried if he was successful. Similarly, a defendant's motion for a mistrial, as long as it is not provoked by intentional prosecutorial misconduct, is no obstacle to a new trial whether or not the defendant had explained to him his double jeopardy rights. United Stats v. Dinitz, supra; United States v. Jorn, 400 U.S. 470, 485 (1971). These cases, like Ball, focus upon the defendant's power to choose a course of action, either to let the issue of guilt go to the jury, or to take it from the jury.

In <u>Santobello v. New York</u>, 404 U.S.

257, 263 n.2 (1971), this Court said

that, if the trial court permitted

Santobello to withdraw from his plea, the

original charges could be refiled. There

was no discussion about express waiver of

double jeopardy. And the Ninth Circuit

has never required an express waiver of double jeopardy when the defendant successfully has a plea set aside.

<u>United States v. Barker</u>, 681 F.2d 589, 590-91 (9th Cir. 1982).

In <u>Jeffers v. United States</u>, 432 U.S.

137, 152 (1977), this Court saw no double jeopardy violation where Jeffers elected to be tried separately on two charges although one was a lesser-included of the other. Again, the focus was upon the <u>defendant's role</u> in bringing about the result.

Probably the clearest expression about when double jeopardy affords no protection is <u>United States v. Scott</u>, 437 U.S. 82 (1978). Concluding that Scott could be retried on two counts that the trial court dismissed at Scott's request before the case went to the jury, Justice Rehnquist said:

[Double jeopardy] is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution.

437 U.S. at 96. Specifically declining to adopt a waiver analysis, this Court said:

We do not thereby adopt the doctrine of "waiver" of double jeopardy rejected in Green.
Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 100.

. When Adamson defiantly breached the plea agreement, he lost the protection of the double jeopardy clause by his voluntarily chosen course of conduct with full understanding of the consequences even though the agreement did not use the words "double jeopardy." The important thing for a defendant to know in such a situation is not the term that applies to his actions, but the consequences that

will flow from his actions. When Adamson knowingly agreed that if he breached the agreement the original charge would be restored, he knew, without saying more, that he agreed to give up his double jeopardy rights. More words would not have made the consequences any clearer.

C.

The Ninth Circuit ignored state findings of historical fact.

The majority opinion runs roughshod over <u>Sumner v. Mata</u>, 449 U.S. 539 (1981), by refusing to recognize that the interpretation of a state court plea agreement and the determination of a breach of that agreement are matters of state law and findings of fact entitled to the presumption of correctness under 28 U.S.C. § 2254(d). If Adamson breached the agreement, he had no double jeopardy protection. The Arizona Supreme Court said he breached. The Ninth Circuit,

however, ignored that finding and discussed how "reasonable" Adamson's interpretation of the plea agreement was. These findings by the Arizona Supreme Court should not have been ignored. Not only does a plain reading of the entire plea agreement, particularly paragraphs 5 and 15, lead to the conclusion reached by the Arizona Supreme Court, but the court's findings were in regard to a state agreement reached in state court in a state criminal prosecution and they are entitled to a presumption of correctness. Curiously enough, the Ninth Circuit gave these findings such a presumption in 1981.

Adamson knew he was breaching the agreement from the outset because he objected repeatedly in the superior court to anyone's interpreting the plea agreement. When he learned the Arizona

Supreme Court would construe the terms of the agreement, he tried to withdraw his petition for special action. Adamson v.

Superior Court, 125 Ariz. 579, 580, 611

P.2d 932, 933 (1980). He did that because he knew he was breaching. The majority omits these facts from the opinion.

Conclusion

The Ninth Circuit has refused to follow clear precedent of this Court and has refused to give a presumption of correctness to state court findings. It has said that Adamson's voluntary course of conduct, which he acknowledged the state would consider a breach, did not forfeit double jeopardy protection. Even less defensibly, it concluded that the language of the plea agreement did not inform Adamson that he had no such protection if he breached the plea even though he never argued that until 1986.

The majority opinion is wrong on the law and the facts, and this Court should grant certiorari to correct it.

Respectfully submitted,

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Chief Counsel Criminal Division

JACK ROBERTS

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Attorneys for PETI'S IONER

AFFIDAVIT

STATE OF ARIZONA)

COUNTY OF MARICOPA)

JACK ROBERTS, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon Timothy K. Ford, 600 Pioneer Building, Seattle, Washington, 98104, Attorney for John Harvey Adamson, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid,

addressed to the Solicitor General,

Department of Justice, Washington, D.C.

20530.

DATED this 3 day of July, 1986.

JACK ROBERTS

Assistant Attorney General Department of Law 1275 West Washington Phoenix, Arizona 85007 Telephone: (602) 255-4686

SUBSCRIBED AND SWORN to before me,

this 301 day of July, 1986.

JANET E. DYER NOTARY PUBLIC

My Commission Expires:

December 10, 1989

9490D jd

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FILED

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NO. 85-___

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1985

STATE OF ARIZONA,

Petitioner,

-vs-

JOHN HARVEY ADAMSON,

Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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12/68

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Opinion of the Ninth Circuit Court of Appeals

John Harvey ADAMSON,

Petitioner-Appellant,

-vs-

James G. RICKETTS, Director, Arizona Department of Corrections, et al.

Respondents-Appellees.

No. 84-2069.

United States Court of Appeals, Ninth Circuit.

Argued En Banc and Submitted Sept. 17, 1985.

Decided May 9, 1986.

OPINION

Habeas corpus petition was filed. The United States District Court for the District of Arizona, C.A. Muecke, J., dismissed petition, and petitioner appealed. The Court of Appeals, 758 F.2d 441, affirmed. That decision was vacated when majority of circuit judges voted to have appeal determined by en banc panel. The Court of Appeals, Ferguson, Circuit Judge, held that: (1) second-degree murder was lesser included offense of first-degree murder, so that, under double jeopardy clause, defendant who pled guilty to second-degree murder could not be reprosecuted for first-degree murder, and (2) defendant did not waive his double jeopardy rights by entering into plea agreement which provided that agreement would become void if defendant

refused to testify in subsequent criminal prosecutions.

Reversed and remanded.

Brunetti, Circuit Judge, filed dissenting opinion in which Kennedy, Alarcon and Beezer, Circuit Judges, joined.

Kennedy, Circuit Judge, filed dissenting opinion.

Timothy J. Foley, San Francisco, Cal.,
Timothy K. Ford, Seattle, Wash., for
petitioner-appellant.

Robert K. Corbin, Atty. Gen., William

J. Schafer, III, Chief Counsel, Jack

Roberts, Asst. Atty. Gen., Phoenix,

Ariz., for respondents-appellees.

Appeal from the United States District Court for the District of Arizona.

Before KENNEDY, HUG, SCHROEDER,

PREGERSON, ALARCON, FERGUSON, NELSON,

BOOCHEVER, NORRIS, BEEZER, and BRUNETTI,

Circuit Judges.

FERGUSON, Circuit Judge:

Petitioner filed a petition for a writ of habeas corpus in the District Court of Arizona after exhausting all his state remedies. He contends that his conviction for first degree murder and death sentence violated various provisions of the federal Constitution. The district court denied his petition, and a panel of this court affirmed that denial, Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). That decision was vacated when the majority of the judges

of the circuit voted to have the appeal determined by an en banc panel. We reverse the district court and direct the issuance of a writ of habeas corpus.

I.

Petitioner Adamson was arrested and charged with the 1976 car bombing murder of Don Bolles, an investigative reporter in Arizona. In January 1977 Adamson and the state entered into a plea agreement with under which Adamson would testify against two other individuals and plead guilty to second degree murder. In exchange, Adamson would receive a sentence of 48-49 years imprisonment, with actual incarceration time to be 20 years, 2 months.

On January 15, 1977, Superior Court Judge Ben Birdsall reviewed the plea

^{*}Footnotes are set out in full at the conclusion of the text.

of its provisions until he determined the appropriateness of the sentence. Four days later, Judge Birdsall found the sentence appropriate and accepted the guilty plea and plea agreement provisions.

After the court's acceptance of the plea agreement, for the next three years Adamson cooperated with authorities. On the basis of Adamson's testimony, Max Dunlap and James Robison were convicted of the first degree murder of Bolles.

While the Dunlap and Robison convictions were pending on appeal, the state moved to have Adamson's sentence imposed.

Judge Birdsall sentenced Adamson to the agreed term of 48-49 years on December 7, 1978.

On February 25, 1980, the Arizona
Supreme Court reversed the convictions of
Max Dunlap and James Robison and remanded

the cases for new trials. State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980); State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980). When the state sought to secure Adamson's testimony in the retrials, Adamson's lawyer stated that his client believed that the plea agreement terminated his obligations once he was sentenced. He further stated that Adamson requested additional consideration, including release, in exchange for his testimony at the retrials. The state, in a letter to Adamson's attorneys dated April 9, 1980, stated that it considered Adamson to have breached the plea agreement by refusing to testify and that Adamson would be prosecuted for first degree murder.3

A few days later, the state called
Adamson as a witness at a pretrial
hearing in the Dunlap and Robison
retrials. Adamson reconfirmed his

previous testimony concerning the Bolles killing but asserted a Fifth Amendment privilege when questioned about another crime. After examining the state's letter of April 9, 1980, Superior Court Judge Robert L. Myers denied the state's motion to compel Adamson to testify. Judge Myers concluded that Adamson could legitimately assert his Fifth Admendment [sic] rights unless the state granted him immunity from prosecution. Although the state sought review of Judge Myers' denial of the motion to compel Adamson to testify, the Arizona Supreme Court declined to accept jurisdiction of the Special Action Petition. Adamson v. Superior Court, 125 Ariz. 579, 582, 611 P.2d 932, 935 (1980) (en banc).

The state filed a new information charging Adamson with first degree murder, id., which he challenged by a Special Action in the Arizona Supreme

Court, id. at 579, 611 P.2d at 933. The court held that Adamson, by refusing to testify, breached the plea agreement and that he waived the defense of double jeopardy. Id. at 584, 611 P.2d at 937. The court vacated Adamson's second degree murder sentence, judgment of conviction, and guilty plea, and reinstated the open murder charge. Following that decision, Adamson offered to accept the state's interpretation of the agreement and to testify against Dunlap and Robison. The state refused Adamson's offer and proceeded with the charge of first degree murder.

Adamson unsucessfully sought federal habeas corpus review pursuant to 28 U.S.C. § 2254, and this court affirmed in an unpublished memorandum disposition the district court's denial of the petition. Adamson v. Hill, 667 F.2d 1030 (9th Cir. 1981). On October 17, 1980,

Adamson was convicted of first degree murder... At sentencing, in accordance with the Arizona statute, Ariz.Rev.Stat.Ann. § 13-703(C), Judge Birdsall concluded that two aggravating circumstances -- (1) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value, and (2) the defendant committed the offense in an especially heinous, cruel or depraved manner -- were present to invoke a death sentence. The Arizona Supreme Court affirmed. State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 464 U.S. 865, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983). The petitioner then instituted the present federal habeas corpus proceeding.

The issues before this court are (1) whether the admission of certain evidence at trial violated the Confrontation

Clause; (2) whether the Arizona statute denied the petitioner's right to a jury trial by permitting judicial factfinding to determine eligibility for a death sentence; (3) whether the Arizona statute's aggravating factor of heinous, cruel or depraved manner is unconstitutionally vague; (4) whether the imposition of a death sentence following Adamson's assertion of his Fifth Amendment rights constitutes prosecutorial or judicial vindictiveness; 4 (5) whether the Arizona statute violates the Eighth Amendment by requiring a death sentence if aggravating circumstances are present; and (6) whether prosecution for first degree murder after Adamson's guilty plea and conviction for second degree murder violated the prohibition against double jeopardy. Because the state's actions violated the Double Jeopardy Clause, we

do not discuss or decide the validity of the remaining issues.

II.

The Double Jeopardy Clause, which applies to state proceedings, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The clause incorporates three separate guarantees: "It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." Justices of Boston Municipal Court v. Lyndon, 466 U.S. 294, 306-07, 104 S.Ct. 1805, 1812-13, 80 L.Ed.2d 311 (1984) (citing Illinois v. Vitale, 447 U.S. 410, 415, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 228 (1980); see United States v. Brooklier,
637 F.2d 620, 621 (9th Cir.), cert.
denied, 450 U.S. 980, 101 S.Ct. 1514, 67
L.Ed.2d 815 (1980).

Implicit in the prohibition against prosecution for the same offense following conviction is the "constitutional policy of finality for the defendant's benefit." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion); see also United States v. Scott, 437 U.S. 82, 92, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 (1978) ("primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment"). Without this respect for finality, prosecutors, equipped with substantially greater resources than most individuals, would be permitted and encouraged to reprosecute defendants when the result was any sentence short of the

maximum penalty. See United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976) ("Underlying" this constitutional safeguard is the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. ") (quoting Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24, 2 L.Ed.2d 199 (1957)).

For a defendant to invoke the double jeopardy bar against a subsequent prosecution, jeopardy must have attached to the first prosecution. When the defendant forgoes the right to have guilt determined by the trier of fact and

instead pleads guilty to the charged offense, under some circumstances jeopardy attaches when the judge accepts the plea. See, e.g., United States v. Vaughan, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983); United States v. Bullock, 579 F.2d 1116, 1118 (8th Cir.), cert. denied 439 U.S. 967, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978).

Here it appears that the plea was accepted subject to certain conditions.

We need not decide whether jeopardy attached upon such an acceptance, see

United States v. Cruz, 709 F.2d 111,

114-15 (1st Cir. 1983), because, in any event, jeopardy attached to the prosecution for second degree murder when Judge Birdsall entered a judgment of conviction and sentenced Adamson on December 7, 1978.

Double jeopardy prohibits multiple prosecutions for the same offense. As a

general rule, a conviction for a lesser-included offense bars the subsequent prosecution for the greater offense. Illinois v. Vitale, 447 U.S. 410, 419-21, 100 S.Ct. 2260, 2266-68, 65 L.Ed.2d 228 (1980); United States v. Stearns, 707 F.2d 391, 393 (9th Cir. 1983), cert. denied, 464 U.S. 1047, 104 S.Ct. 720, 79 L.Ed.2d 181 (1984). The Supreme Court, in Brown v. Ohio, 432 U.S. 161, 168, 97 S.Ct. 2221, 2226-27, 53 L.Ed.2d 187 (1977), determined that a conviction for joyriding barred the subsequent prosecution for the greater offense of auto theft because the "greater offense is . . . by definition the 'same' for the purposes of double jeopardy as any lesser offense included in it." See also Garrett v. United States, ____U.S.___, 105 S.Ct. 2407, 2416, 85 L.Ed.2d 764 (1985) (Brown defendant "engaged in a single course of

conduct"). To analyze this issue we must determine whether each offense "requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); see also Vitale, 447 U.S. at 416-17, 100 S.Ct. at 2265-66.

The state argues that Adamson was not subject to double jeopardy because his first conviction was for second degree murder and his second conviction was for first degree murder. If accepted, this reasoning would vitiate any protection guaranteed by the Double Jeopardy Clause. As with Brown, Adamson's second degree murder conviction was a lesser-included offense of first degree murder. A conviction for second degree murder requires no fact that is not also needed to sustain a first degree murder conviction. Furthermore, the State of Arizona even recognizes this relationship by classifying the two types of murder as different degrees of the same crime. See Ariz.Rev.Stat.Ann. § 13-452, repealed by Laws 1977, ch. 142, § 15, effective October 1, 1978. Thus, Adamson's double jeopardy rights were violated by the subsequent prosecution for first degree murder.

III.

The Arizona Supreme Court agreed that jeopardy attached to the second degree murder prosecution, Adamson v. Superior Court, 125 Ariz. 579, 584, 611 P.2d 932, 937 (1980), but it vacated Adamson's conviction and sentence because it believed that he had waived his double jeopardy rights by the plea agreement. We need not resolve whether a defendant may waive double jeopardy rights in the same manner as other constitutional rights because we conclude that, even if

double jeopardy protection is waivable, it was not waived in this case.

"'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (quoting Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811-12, 81 L.Ed. 1177 (1937), and Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307, 57 S.Ct. 724, 731-32, 81 L.Ed. 1093 (1937)). Before finding that a defendant has waived a right, a court must be convinced that there was "'an intentional relinquishment or abandonment of a known right or privilege.'" United States v. Anderson, 514 F.2d 583, 586 (7th Cir. 1975) (quoting Zerbst, 304 U.S. at 464, 58 S.Ct. at 1023). In situations involving other constitutional rights, we have required a finding that the defendant's waiver was "made voluntarily, knowingly and intelligently." United States v. Cochran, 770 F.2d 850, 851 (9th Cir. 1985) (waiver of right to jury trial). Furthermore, given the importance of the right, such waiver must be made expressly, rather than implied by conduct. Cf. Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L. ad. 2d 195 (1975) (per curiam) (will not imply waiver of double jeopardy rights from guilty plea in second prosecution); Launius v. United States, 575 F.2d 770 (9th Cir. 1978).

The state maintains that Adamson waived the double jeopardy protection when he signed the agreement. It urges this court to adopt the Arizona Supreme Court's conclusion that the plea agreement "by its very terms waives double jeopardy if . . . [it] is

violated." Adamson v. Superior Court of Arizona, 125 Ariz. 579, 584, 611 P.2d 932, 937 (1980).5 To support this conclusion, the state argues that Adamson impliedly waived his double jeopardy claim by accepting paragraphs five and fifteen of the plea agreement. Paragraph five outlines Adamson's obligation to testify and provides that if he refused, "this entire agreement is null and void and the original charges will be automatically reinstated." Paragraph fifteen provides that if "this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement."

The state's contention that these
paragraphs constitute a knowing waiver of
double jeopardy is without merit. It may
well be argued that the only manner in
which Adamson could have made an
intentional relinquishment of a known

double jeopardy right would be by waiver "spread on the record" of the court after an adequate explanation. See Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1968). Even if we were to permit a waiver by implication, the more reasonable interpretation of the agreement is that double jeopardy was not waived. The agreement contains several express waivers of constitutional rights, including the right to a jury trial, to confront and cross-examine witnesses against him, to present a defense, to have appointed counsel, to remain silent, and to be presumed innocent until proved quilty beyond a reasonable doubt. Although each of these waivers is specified in the agreement, double jeopardy is not mentioned. Furthermore, when reviewing the plea agreement, Judge Birdsall questioned Adamson at

length about his waiver of the constitional rights enumerated in the document, but did not inquire about any waiver of double jeopardy claims.

The plea agreement provides in paragraph five that "should the defendant refuse to testify . . . then this entire agreement is null and void and the original charges will be automatically reinstated." Nothing in the agreement specifies that Adamson waived any defenses he had to those charges, including the constitutional defense of double jeopardy. Agreeing that charges may be reinstituted under certain circumstances is not equivalent to agreeing that if they are reinstituted a double jeopardy defense is waived. No evidence has been presented that suggests Adamson knew he was waiving his double jeopardy defense to the reinstituted charge. The plain language of the plea

agreement merely provided that under certain circumstances the charges could be reinstituted.

Even if we assume, as the state contends, that the plea agreement contained an implied waiver of double jeopardy rights, the most that could be found implied in the plea agreement is that if Adamson did, or refused to do, something in the future, his action or inaction would constitute a waiver of his double jeopardy rights. But to meet the test of a knowing, intentional waiver there would have to be an action or inaction that Adamson knew would constitute a waiver. Simple contractual principles are ill-suited to determine whether there has been a waiver of a vital constitutional right. The state argues, in effect, that Adamson entered into a contract, and that implied in that contract was a provision that if it was

breached the contract, even though he did so unknowingly, the effect of the breach would be to waive his double jeopardy rights. Although unintentional breaches of contract can form the basis for damages in civil contract litigation, such principles are inappropriate to determine whether a defendant in a criminal action has knowingly and intentionally waived a constitutional right.

To constitute a knowing and intentional waiver of double jeopardy rights based on the breach of a plea agreement, the defendant's action constituting the breach must be taken with the knowledge that in so doing he waives his double jeopardy rights. Adamson's obligation to testify under the terms of the plea agreement was not clear and was reasonably subject to the interpretation

that he and his attorney advanced. When there was a reasonable dispute as to -Adamson's obligation to testify, there could be no knowing or intentional waiver until his obligation to testify was announced by the court. In this case, the superior court had upheld his refusal to testify and it was not until the Arizona Supreme Court ruling in Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932 (1980), that it was judicially determined that he was obligated under the plea agreement to testify. Immediately thereafter, Adamson agreed to do so.

Adamson reasonably believed that a refusal to testify did not constitute a breach of the agreement. The only unambiguous language in the agreement referring to when his obligation to testify terminated appears in paragraph eight. That paragraph provides that

sentencing would occur "at the conclusion of his testimony in all of the cases." Logic and common sense support Adamson's position that when the state moved for sentencing, it acknowledged that his obligation to provide further testimony ended. The other provisions of the agreement support this interpretation. The state explicitly provided for two obligations that would continue past sentencing -- Adamson's waiver of early parole and his waiver of an appeal. The obligation to testify could quite reasonably be interpreted to terminate at the time of sentencing.

Even if Adamson was obligated to
testify after sentencing, it was
reasonable for him to believe that his
assertion of his Fifth Amendment rights
at the Robison and Dunlap pretrial
hearings did not violate the agreement.
At oral argument, the state admitted that

Adamson's attorney's letter listing the additional demands in exchange for his testimony was not a breach of the agreement. Rather, it was Adamson's assertion of his interpretation of the agreement. Adamson's refusal to testify at the Dunlap and Robison pretrial hearings was in direct response to the state's letter purporting to withdraw the protection of the plea agreement. It was reasonable for him to believe that the state's position vitiated his obligation to testify. Furthermore, Judge Myers upheld the validity of his Fifth Amendment assertion, and the Arizona Supreme Court refused to hear the state's appeal.

We fail to see how advancing one's interpretation of a plea agreement without more constitutes a knowing and voluntary waiver of double jeopardy. A defendant has the right to assert a

reasonable construction of an agreement that differs from the state's interpretation. Otherwise, prosecutors would force defendants into accepting their interpretation. Adamson's position is a reasonable reading of the agreement. The defendant, faced with the state's letter asserting that he was no longer protected from prosecution, could hardly be expected to forgo the constitutional protection against self-incrimination, especially when the Arizona Supreme Court refused to reverse Judge Myers' decision.

Although the Arizona Supreme Court may have correctly decided under state law that Adamson breached the agreement, its vacation of the conviction and sentence did not remove the jeopardy that attached at Adamson's prior sentencing. The court relied on pararaph five's provision that Adamson's failure to testify would

nullify the agreement. By its express provisions, this clause could only result in voiding the executory agreement; it has no effect on the judgment of conviction and sentence.

The state argues that this literal interpretation of the plea agreement would make the bargain illusory. Such a claim ignores available options to ensure performance. Competent drafting of the agreement was certainly a method available to the state. The agreement could have addressed the waiver issue, specifically, whether a double jeopardy defense to a reinstated charge of first degree murder would be waived and what actions of Adamson would bring about the waiver. Even absent sufficient foresight and adequate drafting, the state would have avoided the entire problem by waiting until the Dunlap and Robison prosecutions were completed before having

Adamson sentenced. The state offered no reason why Adamson had to be sentenced in December 1978. In fact, there was none. Both parties had waived the time for sentencing in paragraph eight. Finally, the state could have called Adamson to testify after he agreed to do so. The state claims this last option was inadequate because Adamson's credibility was diminished after his attorney submitted the list of additional requests. We are unpersuaded that a confessed murderer who has agreed to testify in return for a lesser punishment would have less credibility because his attorney made additional demands which were rejected by the state.

We conclude that jeopardy attached to the conviction for second degree murder and that Adamson did not knowingly and intelligently waive his double jeopardy protections. The district court is directed to issue a writ of habeas corpus freeing the petitioner from the sentence and servitude of his conviction of first degree murder and the imposition of the death sentence.

The granting of the writ will not impair in any degree the conviction and sentence of the petitioner for the second degree murder based upon his plea agreement. The petitioner does not assert any invalidity in that sentence, and indeed he cannot as his claim of double jeopardy is based upon the fact that the second degree murder conviction is valid and enforceable. See State v. Shaw, 646 S.W.2d 52 (Mo. 1983) (validity of first conviction unaffected by prohibiting second prosecution); cf. Morris v. Mathews, ____U.S.___, 106 S.Ct. 1032, 1038-39, 89 L.Ed.2d 187

(1986) (appellate court permitted to reduce jeopardy-barred conviction to lesser-included offense that is not jeopardy-barred). Without such a valid conviction, there could be nothing upon which double jeopardy attaches.

The judgment of the district court denying the petition for writ of habeas corpus is reversed. The district court is directed to issue a writ of habeas corpus that frees the petitioner from the death penalty. The writ shall further provide for release of the defendant from all restraint caused by his conviction of first degree murder unless the Arizona Supreme Court, on or before six months from the date of the mandate in this appeal, reinstates the conviction for second degree murder that it previously vacated. See Morris v. Mathews, 106 S.Ct. at 1038-39.

REVERSED AND REMANDED.

FOOTNOTES

- The text of the plea agreement appears in Appendix A.
- The letter sent by Adamson's 2. attorney included the following terms for Adamson's future testimony: (1) release from custody after testifying; (2) to be held in a non-jail facility with full-time protection during the retrials; (3) a complete set of clothing; (4) protection for his ex-wife and son; (5) an educational fund for his son; (6) transportation and funds for establishing a new identity outside of Arizona; and (7) full and complete immunity for all crimes in which he may have been involved, stipulating that none were murders. The full text of the letter is contained in Appendix B.
 - The text of the state's letter is contained in Appendix C.
 - 4. The dissenting opinion contends that in this case there was no prosecutorial or judicial vindictiveness. As we have declined to address the validity of that issue, we express no opinion about the position taken by the dissent.
 - 5. The Arizona Supreme Court relied on the text of the agreement and a statement by Adamson's attorney at the time of sentencing in which Adamson's attorney acknowledged that his client understood that he might have to testify at a future proceeding. The dissent likewise

relies on the attorney's statement as evidence that Adamson knew that his obligations continued after sentencing.

The uncontroverted explanation of this "understanding" is that it involved a wholly separate prosecution. Simply because Adamson might have modified his obligations under the plea agreement to include testifying in the Ashford Plumbing Co. trial after his sentencing, this modification cannot be used as "evidence" that he knew he had to testify further against Dunlap and Robison. Moreover, even if the reference were to the possible Dunlap and Robison retrials, an attorney's actions cannot constitute a waiver of his or her client's protection against double jeopardy. See United States v. Rich, 589 F.2d 1025, 1032 (10th Cir. 1978) ("Inasmuch as this right is anchored to the United States Constitution, it cannot be waived by one other then [sic] the accused.").

The Arizona Supreme Court's finding of a waiver does not preclude this court's own inquiry into that issue. Whether Adamson's actions constituted a waiver of a constitutional right is determined by federal law. Gladden v. Unsworth, 396 F.2d 373, 376 (9th Cir. 1968). In a habeas review a federal court must presume the correctness of a state appellate court's finding of fact unless one of the seven circumstances provided for in 28 U.S.C. § 2254(d) is present or if the state court finding of fact is

not fairly supported by the record and the federal court provides a written explanation for its conclusion. Sumner v. Mata, 455 U.S. 591, 592-93, 102 S.Ct. 1303, 1304-05, 71 L.Ed.2d 480 (1982) (per curiam).

Section 2254(d), however, applies only to questions of "'basic, primary, or historical fac[t]." Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6, 83 S.Ct. 745, 755 n.6, 9 L.Ed.2d 770 (1963)). When the issue includes a mixed question of law and fact or questions of law, section 2254(d) does not require giving a presumption of correctness to the state court's findings. See Fendler v. Goldsmith, 728 F.2d 1181, 1190 n. 21 (9th Cir. 1984).

This case presents a mixed question of law and facts. Section 2254(d) applies to "historical" facts, such as whether Adamson signed the agreement, but it does not apply to whether his actions constituted waiver of double jeopardy. See Sumner v. Mata, 455 U.S. at 597, 102 S.Ct. at 1306-07 (questions of fact governed by section 2254(d), but reviewing court may accord "different weight to the facts"); Fendler v. Goldsmith, 728 F.2d at 1190 n.21. Cf. Miller v. Fenton, ____U.S._ 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) ("voluntariness of a confession is a matter for independent federal determination").

The dissent places great reliance 6. on Jeffers v. United States, 432 U.S. 137, 153, 97 S.Ct. 2207, 2217-18, 53 L.Ed.2d 168 (1977), to dispose of Adamson's double jeopardy claims. At 729. Such reliance is misplaced. The Supreme Court in Jeffers held that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." 432 U.S. at 152, 97 S.Ct. at 2217.

Adamson, unlike Jeffers, never elected to have two offenses set forth in two separate indictments tried separately, nor did he persuade the trial court to honor his election, nor were there in fact two indictments and two trials. The Jeffers exception to Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is unapplicable to the facts of this case.

APPENDIX A

Terms of Plea Agreement

- The defendant, John Harvey Adamson, hereby agrees to plead guilty to Murder, Second Degree.
- The statutory range of sentence for Murder, Second Degree, is probation if no

- sentence is imposed and ten (10) years to life if sentence is imposed.
- 3. The parties agree that the defendant shall receive a sentence of forty-eight (48) to forty-nine (49) years to date from June 13, 1976. The parties agree that the defendant shall be incarcerated for a total of twenty (20) calendar years and two (2) calendar months and that the sentence (48-49 years) when computed with statutory credits will not permit the defendant to complete the service of the maximum sentence of forty-nine (49) years until twenty (20) calendar years and two (2) calendar months have been passed. It is also agreed that the defendant will be incarcerated for no longer than twenty (20) years and two (2) months. Further the parties agree that the defendant will not apply for or be eligible for parole until twenty (20) calendar years and two
- (2) calendar months have passed. If the defendant applies for parole, the defendant agrees that this agreement is null and void and the original charges are reinstated automatically. The parties also agree that if for any reason the statutory time credits the defendant earns while incarcerated are taken away from him through no fault of his, including time spent in protective custody, whether requested by the defendant or ordered by the authorities, the sentencing Court will recompute the length of the sentence so that the defendant will not be incarcerated for any period longer than twenty (20) calendar years and two (2) calendar months.
- 4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all

parties involved in the murder of Don Bolles, and in the beating of Leslie Boros at the Sheraton-Scottsdale, Maricopa County, Arizona, and any and all parties involved in the crimes listed in Exhibits A and B filed with this Court as part of their agreement this date. The contents of the crimes and persons listed in Exhibits A and B shall remain sealed from public view until all of the individuals listed therein have been taken into custody or have had charges filed against them or until the State requests that the contents be made public.

5. It is agreed by all parties that
the defendant shall testify truthfully
and completely at all times, whether
under oath or not, to the crimes
mentioned in this agreement. This shall
include all interviews, depositions,
hearings and trials. Should the
defendant refuse to testify or should he

at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

6. The parties agree that the State will not prosecute the defendant for the following crimes: those he will testify to which are mentioned in this agreement and listed in Exhibits A and B, which are a part of this agreement; those where the defendant's involvement is presently

known to the police and the subject of police reports; those which are material to the direct testimony of the defendant in relation to the crimes listed in this agreement and Exhibits A and B; those crimes which the defendant has revealed to the State in transcribed statements and those presently filed and now pending against the defendant. The pending cases against the defendant in the Maricopa County Superior Court will be dismissed with prejudice at the time of sentencing. The defendant is to be severed in those cases from any other defendants.

- 7. The parties agree that the defendant will not testify to any of the matters referred to in this agreement until Judge Birdsall has accepted all the terms and conditions of this agreement.
- 8. All parties to this agreement hereby waive the time for sentencing and

agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it.

- 9. The parties agree that in case of the resignation, death or incapacitating illness of the Judge assigned to this case, any Superior Court Judge assigned for that purpose by the Presiding Judge of Maricopa County may sentence the defendant in accordance with the terms of this agreement and is thereby bound by the terms of this agreement.
- 10. All parties agree that the sentencing of the defendant may be in any courthouse in any county seat or any other place designated by the sentencing Judge in the State of Arizona in accordance with Arizona Rules of Criminal Procedure and A.R.S. Sec. 12-130(C).

- 11. The parties agree that the defendant will not appeal from the judgment and sentence entered herein except as may be necessary to recompute his sentence to insure that he be incarcerated not longer than twenty (20) calendar years and two (2) calendar months. If the defendant appeals from this plea agreement except as noted herein, this plea agreement shall be null and void and all original charges are automatically reinstated.
- this time, and at all times in the past, that the only party with full authority to enter into any plea negotiations with the defendant herein has been William J. Schafer III, of the office of the Arizona Attorney General, and that any offers alleged to have been tendered by any member of the office of the Maricopa

County Attorney and specifically Donald W. Harris, were made without authority. It is specifically denied by counsel for the defendant that Donald W. Harris ever made any firm offer of ten (10) years actual incarceration to the defendant John Harvey Adamson in exchange for a plea of guilty.

- 13. The parties agree that any Federal immunity from prosecution will be in accord with the document filed by the U.S. Attorney with the Court this date.
- 14. The parties agree that the defendant will serve the agreed upon sentence in a prison outside the State of Arizona.
- 15. In the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement.
- or withdrawn, the defendant hereby gives

up any and all motions, defenses,
objections, or requests he has made or
raised, or could assert hereafter, to or
against the Court's entry of judgment and
imposition of sentence upon him
consistent with this agreement.

- 17. That the defendant understands the following rights and understands that he gives up such rights by pleading guilty:
 - a. His right to a jury trial;
- b. His right to confront the
 witnesses against him and cross-examine
 them;
- c. His right to present evidence and call witnesses in his defense, knowing that the State will compel such witnesses to appear and testify;
- d. His right to be represented by counsel (appointed free of charge, if he cannot affort [sic] to hire his own) at the trial of the proceedings; and

- e. His right to remain silent, to refuse to be a witness against himself, and to be presumed innocent until proven guilty beyond a reasonable doubt.
- 18. The defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement.

APPENDIX B

Letter dated April 3, 1980, from
Petitioner's Attorney to
Attorney General's Office

Stanley L. Patchell, Esq.

Assistant Attorney General

Arizona State Capitol Building

Phoenix, Arizona 85007

Re: State of Arizona vs. John Harvey
Adamson

Case No. CR-93385

Dear Stan:

I am writing to confirm our telephone conversation of April 2, 1980 wherein we discussed the availability of John Adamson for interviews in preparation for his testimony in the trials of the State of Arizona vs. James Robison and Max Dunlap.

As I advised you by phone, I have met with John Adamson at his place of incareration [sic] along with my law partner, Greg Martin. We had lengthy discussions revolving around his expected testimony as well as the plea agreement that he had entered into with the State of Arizona in the above-referenced case number. Further, at that time I also delivered to Mr. Adamson a complete set of transcripts of his testimony in the trial of James Robison and Max Dunlap that was previous [sic] held.

After lengthy discussions and consideration of all of the various aspects of this case and the potential ramifications to Mr. Adamson, I can advise you of the following matters:

 John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona. It is, therefore, his position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of further consideration by the State of Arizona.

- 2. John Harvey Adamson is well aware of the fact that he can be subpoenaed by your office to appear as a witness in any criminal matter; however, he is further aware that the fact that he may be called to the stand does not mean that he must testify. He does understand that he may be directly ordered by the Court to testify and, if he refuses do so, may be held in contempt by the Court.
- 3. John Harvey Adamson is further fully aware of the fact that your office may feel that he has not completed his obligations under the plea agreement in CR-93385 and, further, that your office

may attempt to withdraw that plea agreement from him. He is aware that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge.

- 4. If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met:
- that, upon his completion of his testimony, John Harvey Adamson will be released from custody immediately. The testimony referred to herein is, of course, testimony in an additional trial of the State of Arizona vs. Max Dunlap and possibly, testimony in a separate trial of the State of Arizona vs. James Robison. If separate trials are held, Mr. Adamson's demand for his immediate

release will apply to the completion of his testimony in whichever trial goes first. This demand is not to be considered to be contingent upon any verdict being reached in either case.

b. If the State agrees to the first condition, an additional condition will be that when John Harvey Adamson is transported to Maricopa County for his testimony in the above-referenced trial, that he will not be held in a facility of the Maricopa County Jail or the Maricopa County Sheriff's Department. It is his demand that he be held in a non-jail facility with the agreement that there will be full time, that being 24-hour, protection by some law enforcement agency, preferably the U.S. Marshal's office, for Mr. Adamson's safety.

c. As a further and separate demand,

John Harvey Adamson wishes to have a

complete clothing outfit prior to his

testimony in any trial consisting of a new suit, new shoes, socks, etc.

- d. Mr. Adamson further demands that if his testimony is going to be requested by the State, his ex-wife Mary and his son be provided with protection until such time as Mr. Adamson is released from custody. Further, Mr. Adamson requests that an educational fund be set up for his son.
- e. Mr. Adamson further demands that, upon his release from custody, he will be provided with suitable transportation and funds in order for him to travel to a location outside of the State of Arizona to set up a new identification and life for himself. It is anticipated that the State will work through the U.S. Attorney's office and the U.S. Marshal's office in an attempt to comply with this demand.

f. Further, John Harvey Adamson
demands that, prior to any further
testimony and/or interviews, he be
provided with full and complete immunity
for any and all crimes in which he may
have been involved.

The above basically describes what Mr. Adamson's demands are for his future testimony in any case involving James Robison or Max Dunlap. As we have discussed many times in the past with Bill Schafer, the crimes for which John Adamson requires immunity in order to fully and completely answer any cross-examination by defense counsel, are not of such a nature that the State would be shocked for the State to extend immunity for those crimes. Further, I can represent that any immunity involved as far as any homicide case would be concerned would be an immunity from

prosecution for any indirect, and unknowing, participation in any homicide.

By this letter, it is represented to you that John Harvey Adamson has not been directly involved in any actual homicide outside of the Don Bolles killing.

Again, I would like to re-emphasize the point that it is Mr. Adamson's position that he has fully and completely, and in good faith, fulfilled all of his obligations under the plea agreement. The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing. It is further our position that, without some type of stipulation, a Superior Court Judge will not have any jurisdiction to change, alter, or withdraw Mr. Adamson's plea agreemant [sic] and/or sentence.

I look forward to hearing from you in the near future.

Very truly yours,

MARTIN & FELDHACKER

s/ William H. Feldhacker

William H. Feldhacker

WHF:ir CC/John Harvey Adamson

APPENDIX C

Attorney General's Office

Mr. William H. Feldhacker

Attorney at Law

1045 East Bethany Home Road

Phoenix, Arizona 85014

Re: JOHN HARVEY ADAMSON

Dear Mr. Feldhacker:
In regard to the requested testimony of

John Harvey Adamson in the forthcoming retrial (or retrials) of Dunlap and Robison, the position of the state is as follows:

- 1. The January 15, 1977, plea agreement between the state and John Adamson is still in effect. Because of this the state has the right to call upon Mr. Adamson for testimony and for interviews.
- 2. On April 9, the state did call upon Mr. Adamson, through you, for an interview regarding his forthcoming testimony at the trial. As Mr. Adamson's attorney you refused to allow him to be interviewed.
- 3. Such a refusal by Mr. Adamson is a violation of the plea agreement. Because of such a refusal, the state may now institute proceedings necessary to carry into effect those things noted in the plea agreement that result from a

violation by Mr. Adamson. Specifically those things include: reinstatement of the first degree murder charge against Mr. Adamson for the murder of Don Bolles and its possible punishment of death; reinstatement of all other criminal charges that were dismissed pursuant to the plea agreement; withdrawal of the state's request of the federal government to assume custody of Mr. Adamson.

Mr. Adamson should also be aware that in addition to these things that flow directly from his breach of the plea agreement the state may also institute criminal actions that were not discussed as part of the plea agreement.

In an effort to resolve this question, a deposition of Mr. Adamson has been set by Judge French for 12:30 p.m. on April 10 in the conference room of the

United States Attorney's Office at the Federal Building in Phoenix.

Sincerely,

ROBERT K. CORBIN

Attorney General

/s/ William J. Schafer, III

WILLIAM J. SCHAFER, III

Chief Counsel

Criminal Division

WJS/fn 0144F

BRUNETTI, Circuit Judge, with whom Circuit Judges KENNEDY, ALARCON and BEEZER join, dissenting:

Adamson has no valid double jeopardy defense to his prosecution for first degree murder, therefore I respectfully dissent.

1. Background.

John Harvey Adamson was charged with first degree murder in connection with the bombing death of Donald Bolles in Phoenix, Arizona. His first degree murder trial had commenced and was in the process of jury selection when Adamson and his attorneys struck a plea agreement with the district attorney whereby Adamson agreed to provide testimony against certain individuals, including James Robison and Max Dunlap, with regard to the murder of Donald Bolles, and to plead guilty to a charge of second degree murder. The plea agreement provided that Adamson would receive a sentence of 48-49 years imprisonment, with a maximum of 20 years, two months to be served, and that other charges pending against him would be dismissed.

The plea agreement was submitted to
Arizona Superior Court Judge Birdsall for

approval. At a formal hearing, the judge reviewed each detail of the plea agreement with Adamson, approved the agreement, and the first degree murder trial was suspended. The plea agreement provided for deferred sentencing; accordingly, the sentencing hearing was conducted without review of the details or consequences of the plea agreement.

Adamson's Double Jeopardy Claim.

A review of Adamson's double jeopardy claim'* must acknowledge the "unique nature of the double jeopardy guarantee as compared to other constitutional rights." <u>United States v. Young</u>, 544

F.2d 415, 418 (9th Cir.), <u>cert. denied</u>, 429 U.S. 1024, 97 S.Ct. 643, 50 L.Ed.2d 626 (1976). A double jeopardy claim implicates the "very power of the State

^{*}Footnotes are set out in full at the conclusion of the text.

thus is collateral to, and separable from, those constitutional claims which pertain to a determination of the principal issue at trial, i.e., whether or not the accused is guilty of the offense charged. Abney v. United States, 431 U.S. 651, 659, 97 S.Ct. 2034, 2040, 52 L.Ed.2d 651 (1977). Accordingly we have held that a plea of guilty to a charge brought in violation of the double jeopardy clause does not waive a double jeopardy defense. Launius v. United States, 575 F.2d 770, 771 (9th Cir. 1978). Whether a double jeopardy defense may be waived is a question this circuit has yet squarely to address. The Supreme Court has declined to hold that a double jeopardy claim may never be waived. Menna v. New York, 423 U.S. 61, 63 n.2, 96 S.Ct. 241, 242 n.2, 46 L.Ed.2d 195 (1975). The majority of sister circuits

to bring a defendant into court," and

that have considered the question have concluded that a double jeopardy defense may be waived. See, e.g., United States v. Broce, 753 F.2d 811, 822 (10th Cir. 1985) (double jeopardy claim may be waived by "an informed and intentional relinquishment specifically of . . . rights under the Double Jeopardy Clause of the United States Constitution"); Brown v. Maryland, 618 F.2d 1057, 1058 (4th Cir.) (by pleading guilty after entering into a favorable plea bargain, defendant waived his right to be free from double jeopardy), cert. denied, 449 U.S. 878, 101 S.Ct. 224, 66 L.Ed.2d 100 (1980); McClain v. Brown, 587 F.2d 389, 391 (8th Cir. 1978) (a bar to further prosecution because of former jeopardy is not a jurisdictional defect, but a defense or personal right which must be affirmatively pleaded or is

considered waived); United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977) (the constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be regarded as waived); United States v. Wild, 551 F.2d 418, 424-25 (D.C.Cir.) (constitutional rights which the defendant may waive include the right not to be twice put in jeopardy), cert. denied, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed.2d 226 (1977); United States v. Buonomo, 441 F.2d 922, 924 (7th Cir.) (constitutional immunity from double jeopardy is a personal right which if not affirmatively pleaded at trial will be regarded as waived), cert. denied, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 81 (1971).

Notwithstanding Menna and our decision in Launius, it is certain that the double

jeopardy bar is not absolute. This is nowhere more apparent chan in the context of a retrial following a mistrial. Where a mistrial has been declared without the defendant's request or consent, a new trial may take place so long as there existed a manifest necessity for the mistrial. Illinois v. Somerville, 410 U.S. 458, 461, 93 S.Ct. 1066, 1069, 35 L.Ed.2d 425 (1973). Similarly, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." United States v. Jorn, 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971). This principle reaches its limits in permitting retrial following an unnecessary mistrial, declared without the defendant's request or express consent, if the defendant's statements or silences constitute an implied consent. See United States v. Smith, 621 F.2d 350,

351 (9th Cir. 1980), cert. denied, 449
U.S. 1087, 101 S.Ct. 877, 66 L.Ed.2d 813
(1981).

The mistrial exceptions to the double jeopardy bar clearly refute the notion that the bar is absolute. The Supreme Court in United States v. Dinitz, 424 U.S. 600, 609 n.11, 96 S.Ct. 1075, 1080-81 n.11, 47 L.Ed.2d 267 (1976), has stated that a defendant's double jeopardy quarantee against multiple prosecutions may be served by a mistrial declaration, and that the permissibility of retrial in such cases does not depend on a waiver of the defendant's double jeopardy right. In certain cases a second prosecution may follow the midtrial dismissal of an indictment without running afoul of the double jeopardy clause. See Lee v. United States, 432 U.S. 23, 30, 97 S.Ct. 2141, 2145-46, 52 L.Ed.2d 80 (1977).

An exception to the double jeopardy bar pertinent to Adamson's case is described in Jeffers v. United States, 432 U.S. 137, 152, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168 (1977). In Jeffers, the defendant elected to be tried separately on greater and lesser included offenses. Although a subsequent trial on a greater offense following trial on a lesser included offense is, as a general rule, prohibited by the double jeopardy clause, see Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Jeffers Court found that the defendant's election deprived him of a double jeopardy defense to the second trial. 432 U.S. at 152, 97 S.Ct. at 2217. The Jeffers Court did not speak of "waiver"; rather, the Court concluded that no violation of the double jeopardy clause had occurred. The second trial fell within an exception to the

Brown rule, based on the defendant's role in bringing about the second trial.

This view of the double jeopardy clause was expanded and strengthened in United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), where the Court found permissible a second trial on two counts that had been dismissed in midtrial at the defendant's behest. The Court concluded that the policies underlying the double jeopardy clause do not extend "to include situations in which the defendant is responsible for the second prosecution." Id. at 96, 98 S.Ct. at 2196-97. Again the Court declined to adopt a "waiver" analysis, stating that "the double jeopardy clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." Id. at 99, 98 S.Ct. at 2198.

3. Adamson Knowingly Waived His Fifth Amendment Double Jeopardy Rights.

There is no presumption of acquiesence in the loss of fundamental constitutional rights. The courts indulge in every reasonable presumption against waiver of fundamental constitutional rights.

Johnson v. Zerbst, 304 U.S. 458, 464, 58
S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Id.

On January 15, 1977, Adamson and his three court-appointed attorneys appeared in open court before Arizona Supreme Court Judge Birdsall. Judge Birdsall reviewed the plea agreement with Adamson paragraph by paragraph, and at times, word by word. Adamson intentionally waived his double jeopardy rights when he accepted the totality of the plea agreement negotiated by his three

that Adamson knew the circumstances
confronting him and the consequences of
entering into the plea agreement.
Accordingly, his acceptance of the
agreement constituted a waiver of all
conflicting rights existing at that time.

The record shows the following: On January 15, 1977, Adamson was on trial as the defendant in Case No. CR 93385, Maricopa County, State of Arizona v. John Harvey Adamson, under a charge of open murder for the killing of Donald Bolles. On January 15, 1977, at a time set for continuing the voir dire examination of jurors in the case, the defense and the State of Arizona announced to the court that they had reached a plea agreement and the document with two sealed exhibits, Exhibits A and B, were presented to the court. Exhibits A and B were referred to in, and were part of,

the plea agreement. The exhibits were unsealed and Adamson signed each exhibit in open court whereupon the exhibits were replaced in their respective envelopes and sealed. The signatures of Adamson, his three attorneys and the two attorneys representing the State of Arizona were on the plea agreement.

The judge established that Adamson had four years of college education, never had any mental illness or disease, and was not under the influence of drugs or alcohol. Adamson acknowledged that his signature was on page 5 of the original plea agreement and that he had reviewed the agreement with all three of his counsel. 2 Judge Birdsall told Adamson that he initially plead not guilty to the charge that he murdered Donald Bolles on or about June 2, 1976 in Maricopa County, Arizona, and now by virtue of the plea agreement he was agreeing to plead guilty to murder in the second degree. Judge Birdsall reviewed the nature of murder in the second degree, and then in detail reviewed each paragraph of the plea agreement with Adamson, receiving acknowledgements from Adamson that he understood each plea agreement provision. Adamson acknowledged that he understood that by entering a guilty plea he was giving up his constitutional rights of a speedy public trial by a jury, (his trial being into the third week and in the process of jury selection), the confrontation of witnesses, the presentation of evidence on his own behalf, the right to compel attendance of witnesses, the right to be represented by counsel, and the right to remain silent.

Judge Birdsall reviewed paragraph 5 of the plea agreement with Adamson word for word. He explained to him that one of

the provisions of that paragraph was that should Adamson refuse to testify or at anytime testify untruthfully concerning the crimes mentioned in the agreement, then the agreement would become null and void, and he would be subject to the charge of open murder. Adamson was told that if he was charged and found guilty of first degree murder, he would be subject to the penalty of death or life imprisonment requiring a mandatory twenty-five years of actual incarceration. Adamson stated that he understood what would happen if for any reason the agreement became null and void and the open murder charges were reinstated. As a result of understanding and agreeing to that provision, Adamson, with the advice of his attorneys, accepted the totality of the plea agreement and the benefits derived therefrom in exchange for the rights and

powers he had relinquished as set forth in the agreement. Each of the parties had now recast their legal status, and their respective rights and powers, into the terms of the integrated plea agreement which set forth their new rights and powers, including the enforcement provisions of paragraph 5.

At the conclusion of the plea agreement review Judge Birdsall read Adamson's, his attorneys' and the state prosecutors' acknowledgements of the agreement into the record. All the parties confirmed their signatures and acknowledgements. Judge Birdsall then requested Adamson to establish a factual basis for his plea of guilty to the crime of murder in the second degree, whereupon Adamson related the facts of his participation in the killing of Donald Bolles. At this point Judge Birdsall confirmed that Adamson was satisfied with the legal representation

of his three court appointed attorneys and that he had no complaints concerning the manner in which they had represented him as his attorneys.

The court deferred acceptance of the sentencing provisions in the plea agreement until it could receive and review a presentence report, and concluded by accepting the plea agreement and Adamson's plea to the charge of murder in the second degree.

On January 19, 1977, Judge Birdsall after having reviewed the presentencing report found that the provisions contained in the plea agreement regarding the sentence to be imposed upon Adamson were appropriate and that Adamson should be sentenced strictly in accordance with the provisions contained in the plea agreement. The sentencing date was to be subject to call, and the court set a review hearing in the matter for

January 18, 1978, one year from the date of the hearing. All of the jurors were permanently excused and the case was recessed.

It is evident from a review of the record and of the entire plea agreement and exhibits that the purpose of the plea bargaining was for Adamson, with advice of counsel, to waive any rights he may have had at the time the plea agreement was entered into and to proceed in accordance with the terms of the agreement. He knowingly relinquished and abandoned his right to proceed with the open murder trial subject to the condition that if the agreement was breached and became null and void that the parties would be returned to the positions they were in before the agreement. If Adamson breached the agreement, he could again be subject to a first degree murder charge, but he would

also reacquire the defenses he had waived, especially as to the incriminating statements he had given as part of the agreement. Adamson does not question the legal sufficiency of his counsel's advise [sic] regarding the legal rights he waived under this agreement. It is clear from the record that Adamson, with the aid of his attorneys, knowingly and willingly waived any defense to being subjected again to a first degree murder charge (double jeopardy). Adamson accepted the integrated terms and operation of the plea agreement in exchange for the situation he found himself in at the time the agreement was entered into.

We now must analyze what Adamson received under the plea agreement and what the other parties to the agreement expected and to what they were entitled.

At the time the plea agreement was entered into, Adamson was on trial under an open murder charge for the killing of Donald Bolles. In addition, the state could have prosecuted Adamson for the crimes listed in Exhibits A and B to the plea agreement, crimes in which Adamson's involvement was then known to the police and subject to police reports, and crimes which Adamson had revealed to the state in transcribed statements. Also there were charges in other cases pending against Adamson and other defendants in the Maricopa County Superior Court. state had the power to try Adamson for each of those crimes, and society and the victims of all those crimes had a legitimate expectation and an interest that the state would prosecute those crimes. The state surrendered that power, and society and the victims through the state gave up their

expectations and interests in exchange for Adamson's plea of guilty to the charge of murder in the second degree for the murder of Donald Bolles, and further for Adamson's promise that he would testify fully and completely as required by the plea agreement. As a result of entering into the plea agreement, not only did Adamson eliminate the possibility of being found guilty of murder in the first degree in the pending trial, but he also obtained the state's agreement not to prosecute him for the crimes listed in Exhibits A and B and in paragraph 6 of the plea agreement. The many serious actions and charges against Adamson which could have resulted in a death penalty or imprisonment for the rest of his life were dismissed with prejudice. Adamson bargained for, and received as a result of the second degree murder guilty plea, a sentence no longer

months. Adamson obtained federal immunity from prosecution and was allowed to serve his sentence in a prison outside of the State of Arizona. In turn all that was required of Adamson was his truthful and complete testimony concerning crimes in which he admitted he was involved, and as to which he was obtaining immunity and freedom of prosecution.

To protect the rights of the state in the plea agreement, and to insure the value of Adamson's promise to testify, paragraph 5 of the plea agreement provided that, in the event he failed to testify or defaulted in the terms of the plea agreement, the plea agreement would become null and void and that all original charges would be reinstated.

To insure the mutual benefit and validity to the plea agreement justifying

the removal of Adamson from the threat of the pending trial and all future charges and trials, Adamson waived the rights that would have precluded his being charged again and tried for open murder as a part of the mutuality of waiver of rights and powers that all parties agreed to in the plea agreement. The plea agreement redefined the rights and powers of the parties in an integrated contract. By entering into the plea agreement the parties waived any constitutional rights they may have had and substituted therefor the contractual terms and remedies. Any other interpretation renders the plea agreement ineffectual and unenforceable from the inception.

4. Adamson's First Degree Murder

Conviction is the Consequence of his

Voluntary Choice and is Not Invalidated
by the Double Jeopardy Clause.

The majority correctly notes that valid waiver of a constitutional right ordinarily requires that there be an "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The majority errs, however, in its implicit and fundamental premise that only a waiver could remove the double jeopardy bar to Adamson's retrial. The foregoing review of exceptions to the double jeopardy bar should dispel the notion that waiver is an invariable prerequisite to a valid second trial where jeopardy has once attached. Indeed, Jeffers v. United States, 432 U.S. 137, 152, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168 (1977), turned on

this very point, and, I believe, disposes entirely of Adamson's double jeopardy claim.

In <u>Jeffers</u>, as in <u>Adamson</u>, the two prosecutions were for a greater and lesser included offense. The defendant in <u>Jeffers</u> sought to have the greater and lesser included offenses tried separately. The Court concluded that the defendant's role in bringing about the successive trials removed any constitutional barrier to the second prosecution. <u>Id</u>.

This essentially is Adamson's case.

Jeopardy attached upon Adamson's entry of a guilty plea. See United States v.

Vaughan, 715 F.2d 1373, 1376 (9th Cir. 1983). By entering into the plea agreement, Adamson elected the lesser included offense -- second degree murder. The only difference from Jeffers is that there, a second prosecution on

Adamson it was contingent upon his breach of the plea agreement. But this distinction is without constitutional significance, and in any event would seem to weigh in favor of the state in the case before us.

The Jeffers Court noted that "the considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges." 432 U.S. at 152 n.2, 97 S.Ct. at 2217 n.2. In other words, a different result might have been required had the government acted unilaterally to separate the trials, or if the defendant's voluntariness was compromised or otherwise at issue. Adamson does not seriously contest his voluntariness in entering into the plea agreement, and the

Adamson's admitted refusal to be interviewed in preparation to testify — the triggering event which after all, set into motion the second prosecution.

Adamson must accept responsibility for the second prosecution; the double jeopardy clause "does not relieve a defendant from the consequences of his voluntary choice." United States v.

Scott, 437 U.S. 82, 99, 98 S.Ct. 2187, 2198, 57 L.Ed.2d 65 (1978).

The state's freedom from blame in the events leading to Adamson's retrial distinguishes this case from Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46

L.Ed.2d 195 (1975), and Launius v. United States, 575 F.2d 770 (9th Cir. 1978). In Menna, the defendant was charged with an offense for which he had already served a sentence. Thus, the charge was one the state constitutionally could not

prosecute. 432 U.S. at 62 n.2, 96 S.Ct. at 242 n.2. The state had acted to place the defendant in double jeopardy; accordingly, the defendant's plea of guilty, which removed only the issue of factual guilt from the case, did not impair the defendant's legitimate double jeopardy defense. Id.

Similarly, in Launius, defendants pleaded guilty to a multiplicious information, and received consecutive sentences on two counts, exceeding the statutory maximum for the single offense charged. 575 F.2d at 771. The government was responsible for initiating proceedings in violation of the double jeopardy clause. The defendants' guilty pleas did not waive their double jeopardy rights. Id. at 772. In both these cases the double jepardy violation was directly attributable to the government in the first instance.

Adamson, however, did not plead guilty to an indictment brought in violation of the double jeopardy clause. By the same token, the state did not attempt to redeem an otherwise invalid prosecution by bargaining for his guilty plea. The second prosecution sprung from the terms of the plea agreement itself. Adamson voluntarily agreed to those terms, precipitated his second prosecution, and should not now be heard to complain of the result.

Whether Adamson's actions are viewed as a waiver or as a voluntary choice, his double jeopardy claims fail.

5. Adamson Knowingly and Intentionally Breached the Plea Agreement.

There should be little doubt that

Adamson breached his obligation when he expressly refused to provide interviews in preparation for his testimony in the retrial of Robison and Dunlap. The

purpose of the plea agreement was to obtain Adamson's testimony concerning certain crimes listed in the agreement and in Exhibits A and B and specifically with regard to the Robison and Dunlap trials, the defendants therein being charged with the murder of Donald Bolles. Unless Adamson's testimony as required by the plea agreement was obtained for the state there is no purpose for the plea agreement and for relieving Adamson of the charges and prosecutions listed in the plea agreement. The agreement at paragraph 5 required Adamson to testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in the plea agreement, including all interviews, depositions, hearings and trials. In paragraph 4 of the plea agreement Adamson agreed to testify fully and completely when

requested by proper authorities. By his April 3, 1980, letter through his attorney, Adamson refused to provide requested pretrial interviews, in plain breach of his obligation.

I cannot agree with the majority's view that Adamson was merely advancing a reasonable interpretation of the plea agreement. The majority points to Paragraph 8, which states that Adamson would be sentenced "at the conclusion of his testimony in all of the cases," as the only unambiguous language in the plea agreement regarding the point at which Adamson's obligation to testify would terminate. This language cannot be interpreted out of context and does not bear the construction the majority places upon it. It does not support the view that, by sentencing Adamson, the state relieved him of his duty to testify. The totality of the plea agreement suggests,

and common sense demands, that Adamson was required to testify in the Dunlap and Robison trials whenever called upon to do so.

Paragraph 8 of the plea agreement provides "All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and in Exhibits A and B, which accompany it." (Emphasis added). Adamson argues that because he was sentenced before the retrial of the state's cases against James Robison and Max Dunlap he had no obligation under the plea agreement to testify at the retrial of those two cases. Adamson is incorrect in his contention and the record contains substantial evidence clearly supporting the conclusion that he knowingly and intentionally breached the plea agreement.

Adamson's attorney, William H. Feldhacker, wrote a letter to the Assistant Attorney General on April 3, 1980, (Appendix B to the majority opinion) stating that he and his law partner had met with John Adamson, and that after lengthy discussions and considerations of all the various aspects of the case and potential ramifications to Mr. Adamson, he was advising the Attorney General of the following matters contained in the letter. The letter stated, "John Harvey Adamson believes that he has fully complied with and completed his plea agreement entered into with the State of Arizona. It is, therefore, his position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of

further consideration by the State of Arizona." (Emphasis added).

The reason for the letter is apparent from its first paragraph wherein it confirmed telephone discussions between the state attorneys and Adamson's attorneys as to the availability of Adamson for interviews in preparation for his expected testimony in the retrials of the State of Arizona against James Robison and Max Dunlap. Interviews are clearly and explicitly stated as one of Adamson's obligations in the plea agreement. Throughout the letter the wording establishes that the statements are communications from John Adamson through his attorney to the state. "John Harvey Adamson is well aware of the fact that he can be subpoenaed . . . by your office to appear as a witness in any criminal matter; however, he is further aware that the fact that he may be called

to the stand does not mean he must testify" (paragraph 2); "John Harvey Adamson is further fully aware of the fact that your office may feel he has not completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him" (paragraph 3); "If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met." (Paragraph 4). And then Adamson listed his demands.

Adamson's attorneys do not render their opinion as to whether Adamson's position is correct or reasonable -- only that Adamson had taken a position. The language of the letter is carefully couched in this regard. The second sentence in the last paragraph states

that "The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing." What the plea agreement states is controlling, not what Adamson at the moment of breach alleges was anticipated.

The plea agreement defines the time for sentencing, but it does not set the time for an absolute conclusion of Adamson's duty to testify. Paragraph 18 of plea agreement states that Adamson was to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which Adamson agreed to testify. That paragraph does not limit his duty to testify only to such time that he remains in the custody of the Pima County Sheriff. The plea agreement and the sentence had been accepted by Judge

Birdsall and there remained only a ministerial act of a sentencing hearing to complete the imposition of the sentence fixed by the plea agreement. Adamson's change in status with the Pima County Sheriff and the sentencing only changed the place of his incarceration. That ministerial act of sentencing did not change nor could it change his guilty plea, or the acceptance of a guilty plea by the court, or the terms of the plea agreement including the sentence fixed by the plea agreement. When the plea agreement was finally accepted by the judge he stated "The defendant will be sentenced strictly in accordance with the provisions contained in the plea agreement." The sentencing date was set by Judge Birdsall at that time for January 18, 1978, in accordance with his policy and practice not to leave any

criminal case sentencing date on a subject to call basis.

The procedure in paragraph 8 waived the time for sentencing and set a time for sentencing not for setting a conclusion on Adamson's duty to testify or retestify in a retried case. This subject was discussed with Adamson and all attorneys by Judge Birdsall at the change of plea hearing on January 15, 1977. Judge Birdsall apprised Adamson that he was entitled under the Arizona Rules of Criminal Procedure to be sentenced within ninety days from the acceptance of his plea agreement and that pursuant to the agreement he was waiving the time for sentencing.

The record establishes that Adamson's continuing obligation to testify, before and after sentencing, was known and understood by Adamson and his attorneys.

This is clearly set forth in the dialogue

hearing before Judge Birdsall in Case No.

CR-93385. Adamson and his attorneys,

Gregory H. Martin and William H.

Feldhacker, were present, together with
the Assistant Attorney General William J.

Schafer III. As the court was proceeding
with the sentencing in accordance with
the plea agreement, the following was
said:

THE COURT: All right. The court's sentencing is limited by the terms of the plea agreement which was entered in this case, which was previously accepted by the Court and the Court is going to proceed with the sentencing in accordance with that plea agreement. Do you have anything Mr. Schafer?

MR. SCHAFER: Yes, I would like to add one thing. I wish the record would show that it has been discussed with counsel, and I believe counsel has discussed it with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.

THE COURT: The record may show that.

MR. FELDHACKER: That's our understanding.

MR. MARTIN: That's correct."

Transcript at page 43. (Emphasis added).

Adamson was then sentenced.

It is Adamson's position at this time that his former attorneys have sworn that the "further testimony" involved a wholly separate case than the Bolles murder case, and arising out of the arson of the Ashford Plumbing Company in Phoenix, Arizona. See page 3 n.2 Appellant's Supplemental Brief on Rehearing En Banc. In fact, that "further testimony" is testimony contemplated by and included specifically in the plea agreement, the Ashford Plumbing Company case being one of the cases listed in Exhibits A and B to the plea agreement. Adamson's counsel, William Feldhacker, in his argument of Adamson's petition for special action before the Arizona Supreme

Court on May 28, 1980, appeared with Adamson's other former attorney, Glen Martin. Mr. Feldhacker stated to the court his explanation of the colloquy between counsel at the sentencing hearing before Judge Birdsall regarding the "further testimony." He told the Arizona Supreme Court that at the time of sentencing there was one case left which required Adamson's testimony, and it was from Exhibits A and B appended to the plea agreement, State of Arizona versus Ashford. He admitted to a conversation with Mr. Schafer discussing the Ashford case, in which he agreed that, if necessary Adamson may have to testify in that case.'

It is obvious that testimony after sentencing was contemplated by the clear language of the plea agreement and understood and intended by the parties.

Adamson's anticipated testimony in the

Ashford case after sentencing was not an addition to or amendment of the plea agreement by the parties, but was one of Adamson's obligations required by the plea agreement, acknowledged by Adamson, Adamson's counsel and the state at Adamson's sentencing hearing on December 7, 1978. Adamson can not assert a reservation for refusal to further testify after sentencing in the Robison and Dunlap Bolles murder cases, and at the same time acknowledge an obligation to testify in the Ashford case after sentencing. The plea agreement makes no such distinctions.

Adamson, in an attempt to take a negotiation advantage as a result of the reversal of the <u>Robison</u> and <u>Dunlap</u> cases refused to testify. He attempted to better his position but also took the risk of the refusal to testify. His position at the same time frustrated the

state's prosecution of Robison and Dunlap cases and destroyed the very essence of the plea agreement. Adamson never raised the defense of double jeopardy during the time when he was receiving the benefits quaranteed to him by the plea agreement. However, when the Arizona Supreme Court held that Adamson had breached the plea agreement by refusing to testify, and vacated the second degree murder conviction and sentence and reinstated the open murder charge, 8 Adamson then asserted the position that the plea agreement violated his double jeopardy rights. In fact, those rights were waived when he entered into the plea agreement, and the reinstatement of the first degree murder charge was the consequence of his voluntary choice and excepted from the double jeopardy defense, as fully discussed supra.

In order to escape a possible first degree murder conviction in the trial which was pending at the time of the plea agreement, Adamson accepted all the benefits the state was willing to give for his testimony. Then when faced with further testimony in the Robison and Dunlap cases he attempted to compound his benefits, with further detriment to the state, for the "additional testimony" which was in fact fully contemplated by the plea agreement. The plea agreement and the statements Adamson gave in connection with the plea agreement ostensibly set forth all of the crimes which he was willing to reveal and obtain dismissal and immunity for. However, in paragraph 4(f) of his demand letter of April 3, 1980, Adamson demands further immunity for any and all crimes in which he may have been involved. This is a request for more protection when the

state is still only trying to obtain what it had originally had [sic] bargained for; testimony with regard to the Donald Bolles murder and the other crimes listed in the plea agreement.

After Adamson proceeded in breach of the agreement, the sequence of events that followed was entirely predictable; indeed, the outcome was specified by the plea agreement. Because the results of Adamson's breach were fully contemplated and determined by the plea agreement, it should be upheld by this court.

Prosecutorial Vindictiveness.

I would also reject Adamson's claim that his second conviction violates due process because it is the product of prosecutorial vindictiveness.

In advancing this claim, Adamson relies primarily on the Supreme Court's decision in Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The

Court in Blackledge held that due process forbids a prosecutor from bringing. . . increased charges in retaliation to a defendant's exercise of a constitutional right. Id. at 27-28, 94 S.Ct. at 2102-03. The prohibition against prosecutorial vindictiveness does not require evidence that retaliatory motivation actually existed; rather, it is to the appearance of vindictiveness that the prohibition is directed. The underlying policy is to insure that apprehension of retaliation does not deter a defendant's exercise of the right to appeal or to collaterally attack a first conviction. Id. at 28, 94 S.Ct. at 2102-03.

The problem for Adamson is that he can point to no exercise of a constitutional right that precipitated his second prosecution on an increased charge.

Indeed, the retrial came about because of

his breach of a plea agreement. Because there had been no exercise of a constitutional right, the <u>Blackledge</u> "presumption of vindictiveness," and the policy underlying it, does not apply.

Although Adamson invoked his fifth amendment rights when he refused to testify at a pretrial hearing in the Dunlap and Robison retrials, this exercise of a constitutional right was wholly unconnected to his reprosecution. Adamson had acted in breach of the agreement by his letter of April 3, 1980. The state, by its letter of April 9, 1980, had already indicated that it considered that Adamson had breached the agreement, and his breach permitted reinstatement of the original charges and Adamson's original defenses.

The prosecutor's freedom to seek increased charges is vital to the integrity of the plea bargaining process,

and is well supported by case law. The Supreme Court in Bordenkircher v. Hayes, 434 U.S. 357, 364-65, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978), held that a prosecutor properly could use the threat of increased charges to secure a plea agreement. This is exactly what happened in Adamson's case. The prospect of a first degree murder charge induced Adamson to plead guilty to second degree murder and to promise to testify against Robison and Dunlap and as further specified in the plea agreement. The agreement provided for reinstatement of the first degree murder charge in the event of breach.

It is totally unreasonable and senseless to suggest that the prosecutor could fairly strike a bargain with a first degree murder reinstatement provision, but that prohibitions against

prosecutorial vindictiveness prevent his carrying it out.

The evidence supported the first degree murder charge against Adamson, and society and the victims had a legitimate interest in seeing that charge filed and pursued. In view of the especially savage Bolles murder contract it would have been amazing if the prosecutor had filed anything else. There is no vindictiveness evident in the prosecutor's intent to retry Adamson. The intent to retry arose long before Adamson refused to testify as it was included in the paragraph 5, reinstatement provision of the plea agreement. Allowing Adamson to decide whether or not he should breach the plea agreement or to challenge it constitutionally, and once having lost the challenge to again volunteer to perform the plea agreement makes the

reinstatement clause totally illusory. This gives Adamson the unilateral right to defeat the substance and value of the plea agreement. The threat of the death penalty against Adamson was necessary to insure performance of Adamson's promise that he would testify in accordance with the plea agreement. In any trial or retrial once the trial court swears and seats the jury and the trial proceeds double jeopardy attaches as to that specific defendant. Crist v. Bretz, 437 U.S. 28, 29, 98 S.Ct. 2156, 2157-58, 57 L.Ed.2d 24 (1978). If at that point Adamson takes the stand and asserts the Fifth Amendment, which he had the power (not the right) to do under the plea agreement, then the Dunlap or Robison cases or any other case in which he was to testify cannot be prosecuted. Adamson in fact did that and caused that exact

result with his breach letter of April 3, 1980. In fact, in paragraph 2 of his letter he evidenced his threat that he could not be made to testify. At that point a contempt citation did not bother Adamson. The heart of the plea agreement is the default clauses, paragraphs 3, 5, 11 and 15, containing the reinstatement of open murder charges to prevent Adamson from unilaterally defeating the agreement. Adamson's testimony and credibility were crucial to the conviction of Dunlap and Robison. See State v. Robison, 125 Ariz. 107, 608 P.2d 44, 45 (1980). Adamson's unilateral nonnegotiable demands for his testimony in the retrials destroyed his credibility and the state acted without vindictiveness and appropriately under the agreement to reinstate the open murder charges.

7. The Improper Reinstatement of the Second Degree Murder Conviction and Sentence.

The majority erroneously reads Paragraph 5 in isolation and concludes that under its provisions Adamson's breach would result only in voiding the executory agreement but would have no effect on the second degree murder judgment of conviction and sentence. To the contrary, Paragraph 15, by its very terms applies where the agreement has been voided, and requires that the parties be returned to their positions prior to agreement. Thus the majority's view that the conviction and sentence somehow would survive is refuted by a plain reading of the agreement itself. To leave Adamson with a second degree murder conviction based on his guilty plea, and with a sentence meted out precisely according to the terms of the

agreement, would hardly return him to his position before the agreement.

Adamson cannot again be tried for first degree murder, the plea agreement has been made unenforceable and worthless by the majority opinion, and the parties are left with the scattered remains of all the proceedings which have transpired.

Reinstatement of the second degree murder judgment and sentence is not before this court. The majority, however, having freed Adamson from the death penalty, attempts to prevent his release by imposing upon the Arizona Supreme Court the burden of reinstating the second degree murder conviction within six months. If for any reason the Arizona Supreme Court fails to reinstate the conviction within the six months, Adamson, who has admitted to the involvement in and commission of the crimes set forth in the plea agreement,

will go free. Adamson's status may be in question if the Arizona Supreme Court is unable to reinstate the conviction until after six months. The Arizona Supreme Court's burden is further enhanced by the spectre of another double jeopardy attack based upon the reasoning of the majority opinion. I respectfully submit that the plea agreement was negotiated by the parties to avoid the complications and convolutions brought on by the majority's misinterpretation of the plea agreement, all as set forth in this dissent.

I would affirm the district court's denial of Adamson's petition for writ of habeas corpus.

KENNEDY, Circuit Judge, dissenting:

I concur in general in the dissent by

Judge Brunetti and find compelling his

demonstration that this defendant so well

understood the mechanics of the plea

bargain and the risks consequent from
breach that the majority's requirement of
double jeopardy waiver is pointless.
With all respect, I submit the majority's
analysis rests on other explicit and
implicit assumptions that are quite
contrary to settled principles of double
jeopardy law. I dissent separately to
make clear the full extent of my
disagreement with the analysis apparently
adopted by a majority of the court.

As I explain further below, the principal error of the majority is its assumption that a conviction resting on a plea agreement protects the defendant against trial for a higher offense if the plea or the conviction on which it stands is properly set aside. I submit this is incorrect. The extent of double jeopardy protection when a guilty plea and conviction are set aside requires an inquiry into the grounds upon which they

were set aside. If the conviction here could not stand by reason of a breach of the plea agreement, the defendant could be tried on the same charge or on a higher one, for the conviction rested on the plea alone, not a trial, and the plea was set aside by reason of the defendant's own default, not by the mere fiat of the state. The majority's first false premise is that there was a double jeopardy right to be waived; there was not. The second false premise is that express waiver was required; it was not. The third false premise is that the contract was not a waiver in itself; it was. I turn to a more detailed discussion of these matters.

To begin with, jeopardy may attach upon the entry of a guilty plea. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing

remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969). Guilty pleas are entered under such a variety of circumstances that a general rule is not easily stated, but I should think that when a plea of guilty is accepted on the record and nothing remains but to pass sentence and enter the conviction, jeopardy attaches upon entry of the plea. United States v. Cruz, 709 F.2d 111, 112, 115 (1st Cir. 1983) (holding jeopardy attached upon acceptance of the plea). Despite the majority's statement to the contrary, there were no conditions attendant upon acceptance of this plea, other than the terms of the written plea bargain itself. I would conclude that jeopardy attached upon entry of the plea. With this principle in mind, a major defect of the majority opinion becomes apparent.

By the majority's reasoning, Adamson could have renounced the agreement a week after it was made and, as it holds double jeopardy had not been waived, he would have the same incredible immunity from the agreement's enforcement mechanism as the majority grants him because the conviction and sentence were entered.

The question becomes what jeopardy protection remained after the plea and conviction were set aside. The quality and degree of jeopardy protection derived from a conviction based on a voluntary plea must be confronted by the majority. When the plea or conviction based upon it is set aside and further proceedings commence, the authorities do not support the premise that prosecution for a greater offense is necessarily prohibited. Where a conviction is set aside, the protections of the double

jeopardy clause are only in proportion to, not greater than, the risks assumed by the defendant in the former proceeding. As the plea does not put a defendant at risk of a determination of guilt for a higher offense, a charge for the higher offense may be reinstated when and if the plea or its consequent conviction are set aside, absent, say, a circumstance in which the state somehow is entitled to set aside the plea but acts unilaterally and without cause to impose greater burdens on the defendant.

In <u>United States v. Barker</u>, 681 F.2d
589 (9th Cir. 1982), the defendant agreed
to plead guilty to second degree murder.
She successfully had the conviction set
aside on a section 2255 motion, on the
ground that she had not been adequately
informed of the nature of the second
degree murder charge. <u>Id.</u> at 590. Her
retrial for first degree murder was held

not barred by double jeopardy, because the court's acceptance of the plea to second degree murder did not constitute an implied acquittal of first degree murder. Id. at 590-92. As Judge Hug noted in his opinion for the court in Barker, the precedents are in full accord. Klobuchir v. Pennsylvania, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031, 102 S.Ct. 566, 70 L.Ed.2d 474 (1981) (where conviction of third degree murder set aside, double jeopardy did not bar trial for murder in the first degree, as the prior conviction rested on a plea, not a trial); Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979) (after guilty plea and conviction of murder and dismissal of aggravated murder charge in state court, defendant's appeal in effect withdrew the plea and the original, more serious charge can be reinstated). The rule of Brown v. Ohio, 432 U.S. 161, 97 S.Ct.

2221, 53 L.Ed.2d 187 (1977), is simply not controlling, though the majority assumes its applicability without discussion. That case discusses double jeopardy protections which stem from a plea and a conviction that remain in force, not a plea and conviction that are set aside. Here the state ordered the conviction vacated under terms agreed upon by the defendant, and so acted on a clean slate. In Brown the prosecution attempted to proceed when the conviction on a lesser charge remained in force and unimpeached. Though I reject the fanciful notion that the rule of double jeopardy gives any help at all to the defendant in the face of the express terms of this plea bargain, even if those rules do apply, they do not support the result the majority reaches. The plain fact is there was no double jeopardy protection to waive if the plea and

conviction were to be set aside by the defendant's own acts of default. Adamson not having undergone a trial on the merits and not having established innocence to the charge of murder in the first degree, the trial could and did proceed on the greater charges without offending constitutional principles.

We may turn next to examination of the waiver rules the majority applies to the case. Here too the court departs from controlling authority. Jeopardy is waived in a number of instances by the defendant's own actions, and no express waiver or admonition is required before the court finds the waiver to have taken place. If a defendant moves for mistrial and obtains it, jeopardy is waived though he was not forewarned of such a consequence. United States v. Dinitz, 424 U.S. 600, 609 n.11, 96 S.Ct. 1075, 1080-81 n.11, 47 L.Ed.2d 267 (1976).

This same result occurs where a guilty plea is withdrawn or the conviction based upon it is set aside by reason of the defendant's action. See United States v. Barker, 681 F.2d 589 (9th Cir. 1982) (defendant appeals plea-based conviction). The state can retry the defendant, and the authorities contain no requirement that he be forewarned of such a result. See, e.g., United States v. Jerry, 487 F.2d 600, 606 (3d Cir. 1973) ("where a defendant by his own motion causes the withdrawal of his guilty plea, he has waived his right not to be put in jeopardy a second time"). In the case before us, of course, the defendant was forewarned of the consequences attendant upon breach of the plea agreement. The agreement specifically set forth that the defendant could be retried for murder in the first degree if a breach of the agreement caused the conviction to be set aside, which, as I have demonstrated, is the law in any event.

The majority seems to proceed on the assumption that jeopardy did not attach until the sentencing hearing, and on the further assumption that the record was somehow confused by the colloquy respecting defendant's obligation to give further testimony. As I have indicated, jeopardy attached much earlier, upon acceptance of the plea; and, in any event, the protections of the double jeopardy clause do not extend where the defendant did not face a trial and a plea-based conviction is properly set aside. Beyond this, waiver is not required in any event. Prosecutors do not have to explain the mysteries of double jeopardy before entering into an enforceable plea agreement. The whole purpose of such agreements, as in this case, is to permit the defendant to plead to lesser charges subject to the risk of facing more serious ones if he does not keep his end of the deal. For the court, deus ex machina, to drop the idea of double jeopardy and waiver into the plea bargain context is inconsistent with any reasonable interpretation of the contract made between the defendant and the state. The contract makes no sense if by some legal theory it is contended defendant did not accept it with full knowledge and understanding of its enforcement terms. The defendant well knew that he could not be required to accept the enforcement terms of the plea agreement, and in this context the failure to advise him of his double jeopardy rights is quite beside the point. Indeed, if the phrase "double jeopardy" had been added to the litany of rights the defendant was asked to waive in the plea agreement, competent defense

counsel most surely would have objected to it. For in truth the defendant was not waiving double jeopardy. Its protections would not apply in the event of the breach; and if the second degree conviction remained in force, the defendant was entitled to the protections of the double jeopardy clause. Had the conviction remained in force, there could have been no trial for newly discovered evidence, no new sentencing procedure, or no further trial to impose heavier burdens upon him. Any general waiver of double jeopardy simply would have confused the record.

I recognize that the state has raised certain questions by having entered the second degree conviction before the terms of the bargain were fulfilled, but whether that was in violation of the agreement or somehow excused the defendant's further performance is simply

a state law issue, not a double jeopardy question. The critical issue in the case becomes whether the defendant's acts were in breach of the agreement. That issue is one of state law, nothing more. Its outcome depends on primary and historical facts, which we have no authority to determine. See Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980). Even if we did have authority to scan the state's finding that there was a breach of the agreement, there is ample support for it. The defendant agreed that the first degree charges could be reinstated for a breach, and nothing in the later proceedings changed that compact. When the defendant first gave the state notice of his refusal to cooperate further, his own attorneys specifically noted the possibility that the state would interpret noncooperation as a breach.

The defendant took a risk not without some attractions for him. He was serving a twenty-year sentence. If the state elected to try him for first degree murder, conceivably he might have won an acquittal. It is hardly surprising that one as depraved as Adamson would shrink from a breach of contract and a gamble on the results. The court errs in not recognizing his defiance for what it is.

Finally, the court papers over the consequences of its ruling by telling Arizona it need not set Adamson free if it can find some way to reinstate the second degree murder conviction. We cannot, of course, by our own authority order that conviction reinstated. The matter has not been argued to us, but it may be that under Arizona law reinstatement is not permitted. Given our erroneous double jeopardy ruling, there can be no retrial for first degree

murder; given the Arizona court's final determination that the plea bargain was breached and its ruling that the second degree murder conviction should be vacated, it is not clear to me that as a matter of state law it can turn around and change its decision to accommodate our error. Though I intimate no views as to the outcome under Arizona law, it is not beyond possibility that as a result of our decision the defendant will walk free.

In the context of the plea bargain before us, the double jeopardy analysis of the court is artifical. It gives the defendant a windfall of the kind that results when a court imposes a constitutional interpretation of new dimensions in what should have been a simple case of the making of a bargain and the failure to keep it. I dissent.

FOOTNOTES

- 1. The double jeopardy issue was not raised by Adamson in the district court or his appeal from the district court, but was raised for the first time in this habeas corpus proceeding in appellant's Supplemental Brief on Rehearing En Banc. The double jeopardy defense had been previously rejected by this court in a prior habeas corpus proceeding. See Adamson v. Hill, 667 F.2d 1030 (9th Cir., 1983) [sic], cert. denied, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853 (1982).
- The judge asked "At this point do you believe you understand the provisions of the plea agreement?" Adamson answered "Entirely sir." The judge then asked Adamson "Do you have any questions that you want to ask me about before we go any further?" and Adamson answered "No sir." Transcript, Change of Plea, January 15, 1977, at 7.
- 3. Paragraph 5 of the plea agreement provides: It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is

- null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges not yet filed as of the date of this agreement.
- Adamson signed the following 4. acknowledgement: "I John Harvey" Adamson, have read this agreement with the assistance of counsel, understand its terms, understand the rights I give up by pleading guilty in this matter, and agree to be bound according to the provisions herein." Adamson's three attorneys signed the following acknowledgement: "We have discussed this case and the plea agreement with the defendant. We have advised him of his rights and the consequences of his plea, and we concur in his entry of this plea." The state prosecutors signed the following acknowledgement: "We have reviewed this agreement and agree on behalf of the State of Arizona that the terms and conditions set forth herein are appropriate and are in the interests of justice."
- One of the same three attorneys that appeared for Adamson at his trial, the change of plea hearing and the sentencing hearing.
- Case No. CR-93385, State of Arizona
 John Harvey Adamson, January 19,
 1977 Transcript, Wednesday, 10:00

a.m., before Judge Birdsall, page 37, lines 13-15.

7. The following conversation took place in the Arizona Supreme Court hearing:

JUSTICE HAYS: Counsel, do you give any weight to that portion of the sentencing where I think Mr. Schafer indicated, Now have it clear for the final acceptance of this plea. We have it clear that Mr. Adamson testified some more -- or something to that effect, and nobody seemed to object to that position. I make this response. Was that understood? Does that have any weight, or does it mean --

MR. FELDHACKER: As to the meaning of that, Your Honor -- I think that was on December 7, 1978 -- I believe I have in my notes -- I have that there was a discussion of that. I don't think it's as clear as Your Honor stated, but it's clear that it's understood that it happened.

What happened was that we were asked if there was any legal cause for Mr. Adamson not to be sentenced. We certainly stated there was none. Mr. Schafer said, Yes, I would like to add one thing. I wish the record would show that it has been discussed with Counsel, and I believe Counsel has discussed it

with Mr. Adamson, that it may be necessary in the future to bring Mr. Adamson back after sentencing for further evidence. The record may show that; and I stated, That's our understanding.

Subsequently there was one case left from exhibits A and B that were appended to that plea agreement, and that case left was State of Arizona versus Ashford. It's a case that was under under [sic] investigation. It's basically -- I would submit from my conversation with Mr. Schafer -a case that they concluded they would never be able to actually put together and prosecute. However, Mr. Schafer discussed it with us -- about the Ashford case; about the fact that, you know, we had that in the agreement; that, if necessary, he may have to testify in that case.

Adamson v. Superior Court, No. 14898, Transcript of Proceedings, May 28, 1980, commencing at page 6, line 21. (Emphasis added).

- 8. Adamson v. Superior Court, 125 Ariz. 579, 583, 584, 611 P.2d 932, 936, 937 (1980).
- 9. It was at this point that Adamson filed his first Petition for Writ of Habeas Corpus in the district court which was dismissed on September 26, 1980. Adamson then appealed that

order to this court claiming that the rejection of his double jeopardy argument by both the Arizona Supreme Court and the district court rested on erroneous interpretations of the plea agreement, and that he was denied due process for failure of the courts to hold a full evidentiary hearing to determine that material facts surrounding the breach of the plea agreement. In unpublished Memorandum No. 80-5941 this court on November 30, 1981 affirmed the district court dismissal of Adamson's habeas corpus petition, and upheld the Arizona Supreme Court and federal district court interpretation that Adamson had breached the plea agreement by refusing to testify, and that the plea agreement did not contemplate renegotiation in the event of a retrial. This court further held that Adamson's double jeopardy rights had not been violated, and that due process did not require an evidentiary hearing. Adamson v. Hill, 667 F.2d 1030 (9th Cir., 1981) see page 5 n.4. The United States Supreme Court denied certiorari on March 1, 1982, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,

Petitioner-Appellant,

V.

DC No. CIV 83-2323

PHX(CAM)

JAMES G. RICKETTS,
et al.,

Respondents-Appellees.

ORDER

Before: KENNEDY, HUG, SCHROEDER,

PREGERSON, ALARCON, FERGUSON,

NELSON, BOOCHEVER, NORRIS,

BEEZER and BRUNETTI, Circuit Judges

Upon due consideration, the motion for rehearing filed May 22, 1986 by respondents-appellees is

DENIED.

Filed June 6, 1986

APPENDIX C

MEMORANDUM

OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON, Petitioner-Appellant, V. JERRY HILL, Sheriff of) Maricopa County, State of Arizona; HONORABLE FRED C. STRUCKMEYER, JR., Chief Justice of the Supreme Court of the State of Arizona; HONORABLE WILLIAM A. HOLOHAN, Vice Chief Justice of the Supreme Court of the State of Arizona; HONORABLE JACK D.H. HAYS, HONORABLE JAMES DUKE CAMERON, and HONORABLE FRANK X. GORDON, JR., Justices of the Supreme) Court of the State of Arizona; ROBERT K. CORBIN, Attorney General in and for the State of Arizona, Real Party in Interest: State of Arizona, Respondents-Appellees.)

No. 80-5941

D.C. No. CV 80-502 PHX-CAM

MEMORANDUM

Appeal from the United States District Court for the District of Arizona Carl A. Muecke, Chief District Judge, Presiding Argued and Submitted July 13, 1981 Before: ELY and CHOY, Circuit Judges, and PFAELZER,* District Judge.

Appellant Adamson appeals from a district court order dismissing his habeas corpus petition as legally frivolous and from the district court's subsequent denial of his motions to amend the findings and the judgment. We affirm.

I. The Case

Adamson was charged with Open Murder in the June 1976 bombing death of Donald Bolles, a charge permitting a verdict of first degree murder. The prosecution struck a plea-bargaining agreement with him providing inter alia that Adamson would be allowed to plead guilty to the reduced charge of second degree murder and receive a stipulated sentence. Adamson agreed in

^{*} The Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

return to testify against other individuals under investigation in a number of cases, including his alleged accomplices in the Bolles killing, Max Dunlap and James Robison.

Pursuant to the agreement, Adamson
pleaded guilty to second degree murder on
January 15, 1977. Adamson cooperated
with the prosecution in a number of cases
and Robison and Dunlap were convicted of
first degree murder in the Bolles case
primarily because of his testimony.
Although Adamson began to serve time
after entering his guilty pleas, he was
not formally sentenced until the judgment
of guilt was entered on December 7, 1978,
nearly two years later.

In early 1980, the convictions of
Robison and Dunlap were reversed by the
Arizona Supreme Court. The Arizona
Attorney General, preparing to
reinstitute charges against them,

notified Adamson that his testimony would again be required. Adamson, through his counsel, refused to testify unless the state complied with a list of "non-negotiable" demands, including his release from custody. Adamson claimed that his obligations under the plea agreement ended at the time of his formal sentencing. The state warned Adamson of the consequences of continued recalcitrance, and upon his refusal to cooperate charged him with the original count of first degree murder.

The Arizona Superior Court denied

Adamson's motions to strike the renewed

charge as barred by the existing

judgment. Adamson then filed a Petition

for Special Action with the Arizona

Supreme Court, alleging that the lower

court had abused its discretion in

refusing to block the prosecution. The

Arizona Supreme Court agreed to hear

arguments as to the meaning of the plea agreement despite Adamson's attempt to dismiss the petition when he learned that he could not restrict that court's scope of review.

Following briefing and oral argument, the Arizona Supreme Court concluded that the terms of the plea agreement contemplated a continuing duty on Adamson's part to testify at any retrial made necessary by appellate reversal. The court also ruled that Adamson's breach of his duty to testify constituted a waiver of his right against double jeopardy under the terms of the plea agreement and justified the state's reprosecution. 1/ The court vacated Adamson's existing conviction and reinstated the original charge against him.

Adamson then petitioned the federal district court for a writ of habeas

corpus, seeking to block the impending state prosecution. He argued that the Arizona Supreme Court had erred in making its double jeopardy ruling and that the state had denied him due process by failing to hold an evidentiary hearing prior to interpreting the plea agreement. After hearing oral argument, the district court dismissed the petition as legally frivolous, agreeing with the Arizona Supreme Court that the provisions of the plea agreement obligated Adamson to testify and that his refusal justified the reprosecution. In an order denying several post-judgment motions by Adamson, the court found that Adamson's counsel had discussed at length the merits of the plea agreement issue before the Arizona Supreme Court and rejected Adamson's request for an evidentiary hearing. Adamson was subsequently tried, convicted

of first degree murder and sentenced to death.

II. Analysis

Adamson raises two central arguments on appeal from the district court's order:

(1) that the rejection of his double jeopardy argument by both the Arizona Supreme Court and the federal district court rested on erroneous interpretations of the plea agreement; (2) that he was denied due process by the failure of the state courts to hold a full evidentiary hearing to determine the material facts surrounding the breach of the plea agreement.

We turn to the procedural argument
because its resolution determines the
degree of deference due the state court's
findings of fact. A federal statute
requires that federal courts entertaining
habeas corpus petitions treat state court
findings of fact with a presumption of

correctness so long as the state proceedings meet certain procedural requirements. 28 U.S.C. § 2254(d).

Adamson does not dispute that the Arizona Supreme Court proceeding constituted a "hearing on the merits of a factual issue" as required by the statute. See Sumner v. Mata, 449 U.S. 539, 546

(1981). He argues instead that the state court hearing was procedurally deficient, thus bringing the factual findings within one of the exceptions enumerated in § 2254(d).2/

Adamson argues generally that the record on which the Arizona Supreme Court made its decision was inadequate. More specifically, he argues that an evidentiary hearing should have been held to establish "among other things" the context of a colloquy between the sentencing judge and the parties at the time of sentencing.

We disagree that the state proceedings were procedurally inadequate. The Arizona Supreme Court had the benefit of Adamson's pleadings, oral argument, and a record including inter alia the plea agreement, Adamson's written refusal to testify, and a transcript of the proceedings at Adamson's sentencing. Although Adamson objected to the Supreme Court's consideration of the plea agreement, he was given full opportunity to address the issue and his counsel indeed discussed it at oral argument. He specifically identifies only one issue which would be illuminated by the evidentiary hearing he requests, the meaning of a colloguy between his counsel and the sentencing judge, and that issue is essentially collateral to interpretation of the agreement terms. 1/ The Supreme Court mentioned the colloguy as evidence rebutting

Adamson's interpretation of the plea agreement, but rested its decision upon the provisions of the agreement itself.

See Adamson v. Superior Court, 125 Ariz.

579, 582-83, 611 P.2d 932, 935-6 (1980).

Even if the colloquy were interpreted as Adamson argues it should be, it would cast no doubt on the accuracy of the decision. We find that Adamson was given a full and fair hearing of his claims in state court and that the statutory presumption of correctness attaches to its findings of fact.

Adamson cannot refute that presumption, although he argues that the Arizona Supreme Court erred on the merits in interpreting the plea agreement. The interpretation reached by both the state court and the federal district court, that the plea agreement did not contemplate renegotiation in the event of a retrial, is eminently reasonable. 4/

The same can be said for the significance attributed by both courts to the deferred sentencing provision. \(\frac{3}{2} \) The thrust of that provision concerns a waiver of prompt sentencing rights and not a time for termination of the plea agreement.

This interpretation is buttressed by terms of the agreement obligating Adamson to refrain from appealing the conviction or from applying for parole, obligations which were clearly intended to extend beyond the time of sentencing.

In anticipation that this appeal would fail, Adamson suggests that this court allow him to "cure" his breach of the plea agreement by returning him to the status quo prior to his refusal to testify. Compliance with his request would reduce the meaning of the various state and federal decisions in this case to the status of advisory opinions and render meaningless the trial resulting in

his murder conviction. In his written refusal to testify and list of demands, Adamson acknowledged that he ran the risk of reprosecution for first degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble.

AFFIRMED.

FOOTNOTES

 Paragraph 5 of the plea agreement provides in part that:

> Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges will be automatically reinstated. The defendant will be subject to the charge of Open Murder and if found quilty of First Degree Murder to the penalty of death or life imprisonment requiring mandatory twenty-five (25) years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

- Adamson specifically alleges that
 the state proceedings were
 defective under 28
 U.S.C. § 2254(a)(2), (3), (6) and
 (8), which provide exceptions to
 the presumption of correctness
 where it is established.
 - (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing:

- (3) that the material facts were not adequately developed at the State court hearing;
- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: . . .
- acquiesced in the prosecutor's statement for the record that the opposing counsel had discussed the fact "that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony." Adamson argues that the discussion related only to testimony in a case unrelated to the Bolles case and did not extend to testimony at a retrial.

- 4. Paragraphs 4 and 5 of the plea agreement provide, in pertinent part, that:
 - 4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles, and in the beating of Leslie Boros at the Sheraton-Scottsdale, Maricopa County, Arizona, and any and all parties involved in the crimes listed in Exhibits A and B filed with this Court as part of their agreement this date. . .
 - 5. It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. . . .

In interpreting those provisions, the Arizona Supreme Court held:

Although the plea agreement does not specifically spell out the duration of petitioner's obligations, it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hesitation in holding that the plea agreement contemplates availability of

petitioner's testimony whether at trial or retrial after reversal.

Adamson v. Superior Court, 125 Ariz. 574, 583, 611 P.2d 932, 936 (1980).

- 5. Paragraph 8 of the plea agreement provides:
 - 8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it.

Adamson contends that this provision should be interpreted as indicating that the act of sentencing concluded his obligation to testify.

Filed November 30, 1981

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SEP 8 1986 JOSEPH F. SPANICL, JR. CLERK

No. 86-6

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES RICKETTS,
Petitioner,

v.

JOHN HARVEY ADAMSON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Respondent John Harvey Adamson waive his right to be free from double jeopardy, by invoking his Fifth Amendment rights at a deposition, after the State threatened to prosecute him for interpreting a plea agreement which he reasonably believed he had fully satisfied?

TABLE OF CONTENTS

Page

TABLE OF AUTHO	ORITIES								1
STATEMENT OF	THE FACTS								
REASONS FOR DI	ENYING THE WRIT	• • •							;
BEC ON : THE	TIORARI IS INAPI AUSE THIS CASE T ITS UNIQUE FACTS COURT OF APPEAL EFUTABLY CORRECT	TURNS E S, AS T LS' FIN	XCLU	SIV	ELY		 		- 1
λ.	The Court of I Correctly Appl Legal Princip Facts Of This	lied Es	tabl	ish	ed		 		
В.	The Court of Dispute Any Of Findings Of T	f The I	actu	lal					
CONCLUSION .									

	D	-	fil.	8	
	-	-	ч.	도	

3.7

	Page
CASES	
Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986)	2,3,4,5,6
Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932 (1980)	6
Brewer v. Williams, 430 U.S. 387 (1977)	. 6
Brookhart v. Janis, 384 U.S. 1 (1966)	6
Brown v. Ohio, 432 U.S. 161 (1977)	4
Pay v. Nois, 372 U.S. 391 (1963)	6
Illinois v. Vitale, 447 U.S. 410 (1980)	4
Jeffers v. United States, 432 U.S. 137 (1977)	4
Kimmelman v. Horrison, U.S, 91 L.Ed.2d 305 (1986)	6
Lefkowitz v. Newsome, 420 U.S. 283 (1975)	6
Menna v. New York, 423 U.S. 61 (1975)	4
Miller v. Fenton,	6
Murray v. Carrier, U.S, 91 L.Ed.2d 397 (1986)	6
North Carolina v. Alford, 400 U.S. 25 (1970)	6
Parker v. Illinois, 333 U.S. 571 (1948)	6
Sanabria v. United States, 437 U.S. 54 (1978)	4
Strickland v. Washington, 466 U.S. 668 (1982)	6
Townsend v. Sain, 372 U.S. 293 (1963)	6
United States v. Dinitz, 424 U.S. 600 (1976)	4
United States v. Jorn, 400 U.S. 470 (1971)	4
United States v. Scott, 437 U.S. 82, 100 (1978)	4

RULES AND STATUTES

Wainwright v. Sykes, 433 U.S. 72 (1977)

U.S. Supreme Court Rule 17.1

U.S.C.A. \$2254(d)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES RICKETTS.

Petitioner,

JOHN HARVEY ADAMSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

Petitioner's "Statement of Facts" neither quotes nor cites the record. It contains such substantial omissions, distortions, and editorializations that we feel compelled to set out here, again, the facts on which the Court of Appeals actually ruled:

[John Harvey] Adamson was arrested and charged with the 1976 car bombing murder of Don Bolles, an investigative reporter in Arizona. In January 1977 Adamson and the state entered into a plea agreement under which Adamson would testify against two other individuals and plead guilty to second degree murder. In exchange, Adamson would receive a sentence of 48-49 years imprisonment, with actual incarceration time to be 20 years, 2 months.

On January 15, 1977, Superior Court Judge Ben Birdsall reviewed the plea agreement, but conditioned his acceptance of its provisions until he determined the appropriateness of the sentence. Four days later, Judge Birdsall found the sentence appropriate and accepted the guilty plea and plea agreement provisions.

After the court's acceptance of the plea agreement, for the next three years Adamson cooperated with authorities. On the basis of Adamson's testimony, Max Dunlap and James Robison were convicted of the first degree murder of Bolles. While the Dunlap and Robison convictions were pending on appeal, the state moved to have Adamson's sentence imposed. Judge Birdsall sentenced Adamson to the agreeed term of 48-49 years on

December 7, 1978.[1]

on February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison and remanded the cases for new trials. State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980); State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980). When the state sought to secure Adamson's testimony in the retrials, Adamson's lawyer stated that his client believed that the plea agreement terminated his obligations once he was sentenced. He further stated that Adamson requested additional consideration, including release, in exchange for his testimony at the retrials. The state, in a letter to Adamson's attorneys dated April 9, 1980, stated that it considered Adamson to have breached the plea agreement by refusing to testify and that Adamson would be prosecuted for first degree murder.

A few days later, the state called Adamson as a witness at a pretrial hearing in the Dunlap and Robison retrials. Adamson reconfirmed his previous testimony concerning the Bolles killing but asserted a Fifth Amendment privilege when questioned about another crime. After examining the state's letter of April 9, 1980, Superior Court Judge Robert L. Myers denied the state's motion to compel Adamson to testify. Judge Myers concluded that Adamson could legitimately assert his Fifth Amendment rights unless the state granted him immunity from prosecution. Although the state sought review of Judge Myers' denial of the motion to compel Adamson to testify, the Arizona supreme Court declined to accept jurisdiction of the Special Action Petition. Adamson v. Superior Court, 125 Ariz. 579, 582, 611 P.2d 932, 935 (1980) (en banc).

The state filed a new information charging Adamson with first degree murder, id., which he challenged by a Special Action in the Ariziona Supreme Court, id. at 579, 611 P.2d at 933. The court held that Adamson, by refusing to testify, breached the plea agreement and that he waived the defense of double jeopardy. Id. at 584, 611 P.2d at 937. The court vacated Adamson's second degree murder sentence, judgment of conviction,

and guilty plea, and reinstated the open murder charge. Following that decision, Adamson offered to accept the state's interpretation of the agreement and to testify against Dunlap and Robison. The state refused Adamson's offer and proceeded with the charge of first degree murder. [3]

Adamson v. Ricketts, 789 F.2d 722, 724-25 (9th Cir. 1986)
(court's footnotes omitted).4

Petitioner's quarrel with the Court of Appeals turns wholly on these facts; yet he has not provided a single citation or reference suggesting that the Court of Appeals was wrong in any of these findings. Neither the District Court, nor the state courts before, made any findings to the contrary. Only by misrepresenting the record to this Court can Respondent suggest the Court of Appeals was wrong.

REASONS FOR DENYING THE WRIT

 CERTIORARI IS INAPPROPRIATE HERE, BECAUSE THIS CASE TURNS EXCLUSIVELY ON ITS UNIQUE FACTS, AS TO WHICH THE COURT OF APPEALS' FINDINGS ARE IRREFUTABLY CORRECT.

The Petition in this case refers the Court to none of the considerations governing the exercise of the certiorari jurisdiction, Rule 17.1, because none of them support review here. A fair examination of the Court of Appeals' opinion shows it constitutes nothing more than the application of established

petitioner avoids mentioning that the plea agreement specifically provided that "the defendant will be sentenced at the conclusion of his testimony in all the cases" (789 F.2d at 732; App. A42), and that it was the State of Arizona that moved to have the sentence imposed, 789 F.2d at 724, 729-30. This was the factual premise of the Court of Appeals' critical conclusion that "[t]he obligation to testify could quite reasonably be interpreted to terminate at the time of sentencing." 789 F.2d at 729, App. A26. "Logic and common sense support Adamson's position that when the state moved for sentencing, it acknowledged his obligation to provide further testimony ended." Tbid.

Petitioner omits Judge Myers' ruling altogether.

Again, the fact that he, as the presiding Arizona state trial judge at the deposition, specifically upheld the very assertion of rights by Mr. Adamson that the State later argued was an illegal breach of the plea agreement, was crucial to the Court of Appeals' decision holding Adamson's behavior reasonable. "The defendant, faced with the state's letter asserting he was no longer protected from prosecution, could hardly be expected to forego the constitutional protection against self-incrimination, especially when the Arizona Supreme Court refused to reverse Judge Myers' decision." 789 F.2d at 729, App. A28.

Again, Petitioner does not tell this Court that, as soon as there was any judicial determination that he was obligated to testify further, Mr. Adamson accepted that obligation and offered to resume his testimony. This fact, too, was a lynchpin of the Court of Appeals' decision.

When there was a reasonable dispute as to Adamson's obligation to testify, there could be no knowing or intentional waiver until his obligation to testify was announced by the Court. In this case, the Superior Court had upheld his refusal to testify and it was not until the Arizona Supreme Court ruling ... that it was judicially determined that he was obligated to testify. Immediately thereafter, Adamson agreed to do so.

789 F.2d at 729; App. A25.

The Court of Appeals' disposition of this issue rendered it unnecessary to reach a number of additional issues raised by the Petition. 789 F.2d at 725. Notable among these was the question of arbitrariness and vindictiveness in the prosecutors' actions in continuing to seek the death penalty against John Adamson (and permitting the other perpetrators of this crime to go free) when he has remained willing to testify according to the original terms of his agreement since it was first interpreted by the Arizona courts to require his further testimony. <u>Ibid</u>.

legal principles to indisputable facts. Nowhere did the Court of Appeals break new legal ground, and nowhere did it dispute or disregard any findings made in state court, or elsewhere.

A. The Court of Appeals' Decision Correctly
Applied Established Legal Principles To The
Unique Facts Of This Case.

In deciphering the unique posture of this case, the Court of Appeals majority extensively reviewed a detailed plea agreement, an exchange of letters, a number of state court hearings, and a lengthy habeas record. Applying accepted principles of law to the documents and proceedings involved, it found that double jeopardy protections barred the second murder conviction and death sentence imposed on Respondent John Harvey Adamson, after the had already been sentenced to prison for the exact same crime.

The Petition reveals that Petitioner's real disagreement is not with the legal basis of the Circuit's opinion, but its factual determinations.

The legal principles used by the Court of Appeals are hardly subject to dispute. First, double jeopardy prohibits multiple prosecutions for a single course of conduct. Brown v. Ohio, 432 U.S. 161, 168 (1977); Illinois v. Vitale, 447 U.S. 410, 419-421 (1980); 789 F.2d at 726; App. Al5. Second, a waiver of double jeopardy rights must at least be a defendant's "voluntary choice". United States v. Scott, 437 U.S. 82, 100 (1978); see Menna v. New York, 423 U.S. 61 (1975).

All the Court of Appeals required the state to show here was some "action or inaction that Adamson knew would constitute a waiver." 789 F.2d at 728; App. A23. Every decision of this Court finding an exception from Double Jeopardy protection has required at least that. 5 Petitioner does not attempt to argue to the contrary, but it has never identified such an action.

Instead, it simply sprinkles its arguments with bald assertions—unsupported by citation or evidence—that Adamson "deliberately"

breached the plea agreement (Pet. 14, 21-22, 23-24), without ever specifying when this supposed "deliberate" breach occurred.

Petitioner attempted to avoid that specificity below. It was only in oral argument that the Court of Appeals finally pinned Petitioner's counsel down on this and he specified Adamson's invocation of his Fifth Amendment right at the Dunlap and Robison pretrial hearing, as the alleged breach of the plea agreement and the waiver of Double Jeopardy protections. See 789 F.2d 729; App. A26-7. But as the Court of Appeals noted,

Adamson's refusal to testify at the Dunlap and Robison pretrial hearings was in direct response to the State's letter purporting to withdraw the protections of the plea agreement. It was reasonable for him to believe that the State's position vitiated his obligation to testify. Furthermore, Judge Myers upheld the validity of his Fifth Amendment assertion, and the Arizona Supreme Court refused to hear the State's appeal.

<u>Ibid.</u>, App. A27. The Court of Appeals understandably refused to accept the State's assertion that Adamson waived his constitutional rights by asserting them in the manner that was contemporaneously upheld by the presiding state trial judge.

All the Court of Appeals decided here is that, "even if the double jeopardy protection is waivable, it was not waived in this case." 789 F.2d 727, App Al7-18. Its determination of this factually based question is unassailable.

B. The Court of Appeals Did Not Dispute Any Of The Factual Findings Of The Arizona Courts.

Nothing in the Court of Appeals' opinion infringes in any way upon the factual findings made by the Arizona State Courts. There never has been any real dispute over what the facts of this case are. Most of them are contained in documents, the contents of which are undisputed. The Court of Appeals' findings tracked these documents, and assumed the correctness of the state court's interpretation of the agreement as a matter of contract law. See 789 F.2d at 729. But it also recognized—as Petitioner does not—the distinction between the law of contracts and the Constitution:

The state argues, in effect, that Adamson entered into a contract, and that implied in that contract was a provision that if it was ultimately determined that Adamson breached the contract, even though he did so

⁵ See, e.g., Jeffers v. United States, 432 U.S. 137, 151-52 (1977); Sanabria v. United States, 437 U.S. 54, 63 n.15, 75-6 (1978); United States v. Dinitz, 424 U.S. 600, 606-09 (1976); United States v. Jorn, 400 U.S. 470, 484-86 (1971).

unknowingly, the effect of the breach would be to waive his double jeopardy rights. Although unintentional breaches of contract can form the basis for damages in civil contract litigation, such principles are inappropriate to determine whether a defendant in a criminal action has knowingly and intentionally waived a constitutional right.

789 F.2d at 728-9, App. A23-24.

One searches its decision in vain to identify the "question of 'basic, primary, or historical fact,' Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963)", Strickland v. Washington, 466 U.S. 668, 698 (1982), on which Petitioner contends the Court of Appeals overruled the state court. The disagreement between the Court of Appeals and the state court lay in its assessment of the legal effect of the actions and statements of the parties involved. To the extent the Arizona Supreme Court addressed the double jeopardy waiver issue, 6 its conclusion may have been inconsistent with the Court of Appeals'. But that hardly offends Section 2254(d). Issues of the loss or abandonment of federal constitutional rights are ultimately questions of federal law. 7 The determination of whether a particular act or omission forfeits a federal right thus is not subject to the presumption of Section 2254(d). Miller v. Fenton, ___ U.S. ___, 88 L. Ed.2d 405 (1985); Brewer v. Williams, 430 U.S. 387, 397 n.4, 403-5 (1977). The Court of Appeals would have abrogated its duty, had it deferred to the Arizona state court's decision of that question. It properly did not; and its resolution of the issue is fully supported by the record.

CONCLUSION

This case involves no conflict among the lower courts, no important question of federal law which has not been, but should be, settled by this Court, and no inconsistency with this Court's decisions. Rule 17.1. The Court of Appeals correctly decided the Double Jeopardy question here, after carefully sorting through the unusual facts of this case. There is no ground here for this Court's intervention.

Respectfully submitted,

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September 8, 1986

The state court's only reference to the double jeopardy issue, in fact, does not appear to have resolved the question the Court of Appeals ultimately decided. The state court only addressed the Double Jeopardy objection the defendant had raised to the State's filing of a new information. Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932, 933 (1980). It held that issue moot, in light of its decision that the filing of the new information was improper on separate grounds. Ibid. It thus seems doubtful that even if §2254(d) applied to it, the issue decided by the state court was the same issue on which the Court of Appeals' decision turned. Cf. Kimmelman v. Morrison, _____U.S.__, 91 L.Ed.2d 305, 328-9 (1986).

⁷ Murray V. Carrier, U.S. ___, 91 L.Ed.2d 397, 414 (1986); Wainwright V. Sykes, 433 U.S. 72, 84 n.8 (1977); Lefkowitz V. Newsome, 420 U.S. 283, 290 n.6 (1975); North Carolina V. Alford, 400 U.S. 25 (1970); Brookhart V. Janis, 384 U.S. 1, 4 (1966); Fay V. Noia, 372 U.S. 391, 438-39 (1963); Townsend V. Sain, 372 U.S. 293, 309 n.8, 318 (1963); Parker V. Illinois, 333 U.S. 571 (1948).

NO. 86-6

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SEP 29 HOR

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JAMES G. RICKETTS,

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-vs-

JOHN HARVEY ADAMSON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This case was originally docketed in July under the title <u>Arizona v. Adamson</u>.

Question Presented

Does waiver of double jeopardy protection require that the phrase "double jeopardy" be inserted into a plea agreement when it is clear, from the terms of the agreement, and the trial court's explanation to a defendant assisted by three attorneys, that, if he breached the agreement, the state may prosecute him for first-degree murder, and is the state court's interpretation of the terms of that agreement, and the rights forfeited under it, a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d)?

TABLE OF CONTENTS

	rage
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
ARGUMENT	
THE MAJORITY OPINION REFUSES TO	
RECOGNIZE THAT THE INTERPRETATION OF A STATE PLEA AGREEMENT BY THE	
ARIZONA SUPREME COURT IS A FACTUAL	4
DETERMINATION ENTITLED TO THE PRESUMPTION OF CORRECTNESS, BUT	
THE NINTH CIRCUIT GAVE IT THAT	-
PRESUMPTION IN 1981.	1

TABLE OF CASES AND AUTHORITIES

Case	Page
Adamson v. Hill 455 U.S. 992 (1982)	2
Adamson v. Hill Memorandum No. 80-5941 (9th Cir., Nov. 30, 1981)	2,9
Adamson v. Ricketts 789 F.2d 722 (9th Cir. 1986)	4
Adamson v. Superior Court	
125 Ariz. 579 611 P.2d 932 (1980)	1
Sumner v. Mata	
449 U.S. 539 (1981)	7
Authorities	
28 U.S.C. § 2254(d)	7

ARGUMENT

THE MAJORITY OPINION REFUSES TO RECOGNIZE THAT THE INTERPRETATION OF A STATE PLEA AGREEMENT BY THE ARIZONA SUPREME COURT IS A FACTUAL DETERMINATION ENTITLED TO THE PRESUMPTION OF CORRECTNESS, BUT THE NINTH CIRCUIT GAVE IT THAT PRESUMPTION IN 1981.

Petitioner has pointed out that the key to this case -- the interpretation of the plea agreement, and John Harvey Adamson's deliberate breach of it -- was decided as a <u>factual</u> matter by the Arizona Supreme Court, in <u>Adamson v. Superior Court</u>, 125 Ariz. 579, 611 P.2d 932 (1980). In 1981, a three-judge panel of the Ninth Circuit, looking at the same agreement, said:

We find that Adamson was given a full and fair hearing of his claims in state court and that the statutory presumption of correctness attaches to its findings of fact.

Adamson cannot refute that presumption, although he argues that the Arizona Supreme Court erred on the merits in interpreting the plea agreement. The interpretation reached by both the state court and the federal

district court, that the plea agreement did not contemplate renegotiation in the event of a retrial, is eminently reasonable.

Adamson v. Hill, Memorandum No. 80-5941, at 5, (9th Cir., Nov. 30, 1981) (footnote omitted) (pg. C-10 in the appendix to the petition). It could not be plainer that the Ninth Circuit in 1981 treated the interpretation of Adamson's obligations under the agreement, and his waiver of rights, as a factual determination by the Arizona Supreme Court, and accorded that court's findings a presumption of correctness. This Court denied certiorari. Adamson v. Hill, 455 U.S.

When this Court looks at the majority opinion in the instant case, it will find not one word about the Arizona Stpreme Court's interpretation of the agreement being a purely factual determination, and will certainly find no deference in the

form of a presumption of correctness.

Judge Kennedy, writing separately as one of four dissenters to emphasize the extent of his disagreement with the majority's analysis, said:

Prosecutors do not have to explain the mysteries of double jeopardy before entering into an enforceable plea agreement. The whole purpose of such agreements, as in this case, is to permit the defendant to plead to lesser charges subject to the risk of facing more serious ones if he does not keep his end of the deal. For the court, deus ex machina, to drop the idea of double jeopardy and waiver into the plea bargain context is inconsistent with any reasonable interpretation of the contract made between the defendant and the state. The contract makes no sense if by some legal theory it is contended defendant did not accept it with full knowledge and understanding of its enforcement terms. The defendant well knew that he could not be required to accept the enforcement terms of the plea agreement, and in this context the failure to advise him of his double jeopardy rights is quite beside the point. Indeed, if the phrase "double jeopardy" had been added to the litany of rights the defendant was asked to waive in the plea agreement, competent defense counsel most surely would have

objected to it. For in truth the defendant was not waiving double jeopardy. Its protections would not apply in the event of the breach; and if the second degree conviction remained in force, the defendant was entitled to the protections of the double jeopardy clause . . .

The critical issue in the case becomes whether the defendant's acts were in breach of the agreement. That issue is one of state law, nothing more. Its outcome depends on primary and historical facts, which we have no authority to determine. See Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980). Even if we did have authority to scan the state's finding that there was a breach of the agreement, there is ample support for it.

In the context of the plea bargain before us, the double jeopardy analysis of the court is artificial. It gives the defendant a windfall of the kind that results when a court imposes a constitutional interpretation of new dimensions in what should have been a simple case of the making of a bargain and the failure to keep it. I dissent.

Adamson v. Ricketts, 789 F.2d 722, 749-50 (9th Cir. 1986) (emphasis supplied).

In order to ignore the Arizona Supreme Court's interpretation of the plea agreement, the majority imposed the artificial requirement of "waiver" of double jeopardy, in express terms, upon the plea agreement. By so doing, it proceeded to the conclusion that that converted the issue into a mixed question of law and fact, and further limited the meaning of "historical facts" to mechanical matters such as whether Adamson signed the plea agreement. 789 F.2d at 727-28 n.5. The majority erred further by saying that whether Adamson's actions constituted a waiver of a constitutional right was a question of federal law. Id. The overriding questio. was what Adamson gave up under the provisions of the plea agreement in the event he breached. The second factual question was whether his actions constituted a breach. The Arizona

Supreme Court decided both of these adversely to him in 1980 and the Ninth Circuit agreed in 1981. The majority opinion thus ignores the law of the case for 5 years, and recasts the question from 1981 to 1986 into a mixed one of law and fact. There was no other way for the majority to reach the result it did.

We have five Arizona Supreme Court justices in 1980 making factual findings that Adamson gave up certain protection under the language of the plea agreement in case he breached it, and a further finding that he breached it. We have a district judge and three judges of the Ninth Circuit in 1981, and four more in 1986, agreeing that those determinations are matters of state law and factual findings due a presumption of correctness. Juxtaposed to that are the seven members of the majority in 1986 saying these are mixed questions of law

and fact, and ignoring the factual conclusions of the Arizona Supreme Court. In toto, we have 13 judges on one side and 7 on the other. One of these groups is wrong in its approach to this case, and wrong about whether the record sustains the factual conclusions of the Arizona Supreme Court. Petitioner respectfully submits that the Ninth Circuit applied the proper standard of review in 1981. The majority in 1986 has violated, not only its own law of the case ruling, but Sumner v. Mata, 449 U.S. 539 (1981), 28 U.S.C. § 2254(d), and has created a new constitutional requirement of express waiver of a right in a context where neither this Court, nor the Ninth Circuit, has ever held it must be expressly waived by inserting the legal term of art "double jeopardy" into a plea agreement.

John Marvey Adamson, assisted by three attorneys before he entered into the plea agreement, knew what it said, and what the consequences were if he breached it. Anyone who reads the plea agreement as what it is, a contract, will come to that conclusion. Having the state momentarily at a disadvantage after the Arizona Supreme Court reversed the Dunlap and Robison convictions, he sought to capitalize on that by making new "non-negotiable" demands. In 1981 the Ninth Circuit, rejecting his double jeopardy argument, said:

In anticipation that this appeal would fail, Adamson suggests that this court allow him to "cure" his breach of the plea agreement by returning him to the status quo prior to his refusal to testify. Compliance with his request would reduce the meaning of the various state and federal decisions in this case to the status of advisory opinions and render meaningless the trial resulting in his murder conviction. In his written refusal to testify and list of demands, Adamson

acknowledged that he ran the risk of reprosecution for first degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble.

AFFIRMED.

Adamson v. Hill, supra, at 5-6. (Pgs. C-11 and 12 in appendices to the petition.)

Having decided the case correctly in 1981, a majority of the Ninth Circuit in 1986, in effect, has rewarded Adamson's open defiance and attempt to extract new concessions from the state by leaving this admitted hired killer with the benefit of a bargain he breached, and nullifying the prosecution's right, specifically reserved under the plea agreement, to try him for first-degree murder. This Court should not leave that offensive result undisturbed.

Respectfully submitted,

ROBERT K. CORBIN Attorney General

ACK ROBERTS

Assistant Attorney General Attorneys for PETITIONER

10

AFFIDAVIT

STATE OF ARIZONA) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he is a member in good standing of the United States Supreme Court Bar.

That on the 19th day of September,

1986, he deposited in a United States

Post Office with first-class postage

prepaid forty (40) copies of the REPLY TO

OPPOSITION TO PETITION FOR WRIT OF

CERTIORARI, in James G. Ricketts v. John

Harvey Adamson, No. 86-6, addressed to:

The Honorable Joseph Spaniol, Jr. United States Supreme Court Office of the Clerk Washington, D.C. 20543

and caused to be deposited three (3) copies addressed to:

TIMOTHY K. FORD 600 Pioneer Building Seattle, Washington 98104 Attorney for JOHN HARVEY ADAMSON

Solicitor General Department of Justice Washington, D.C. 20530

That to his knowledge the mailing of the petition took place on September 19, 1986.

CK ROBERTS

Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 19th day of September, 1986.

CHRIS L. PISKE NOTARY PUBLIC

My Commission Expires:

October 28, 1989

0234d clp

FILED

No. 86-6

VOV 20 1006

Supreme Court of the United States

October Term, 1986

JAMES G. RICKETTS, et al.,

Petitioners.

VS.

JOHN HARVEY ADAMSON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 3, 1986 CERTIORARI GRANTED OCTOBER 6, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964 or call collect (402) 342-2831

TABLE OF CONTENTS

	I
1.	Revelant Minute Entries.
2.	Transcript of January 15, January 19, 1977 and December 7, 1978 (change of plea and sentencing) (1 vol.).
3 .	Partial transcript of April 18, 1980.
4.	Petitioners' Motion to Compel, filed April 22, 1980.
5.	Partial Transcript of April 22, 1980.
6.	Partial Transcript of April 24, 1980.
7.	Information, filed May 8, 1980.
8.	Respondent's Petition for Special Action, filed May 13, 1980.
9.	Petitioners' Response to the Petition for Special Action, filed May 16, 1980.
10.	Respondent's Motion to Dismiss the Petition for Special Action, filed May 16, 1980.
11.	Petitioners' Opposition to the Motion to Dismiss, filed May 16, 1980.
12.	Respondent's Reply to Petitioners' Opposition to the Motion to Dismiss the Petition for Special Action, filed May 19, 1980.
13.	Transcript of May 28, 1980, Oral Argument before the Arizona Supreme Court on Respondent's Petition for Special Action.
14.	Opinion of the Arizona Supreme Court in Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932 (May 29, 1980).
15.	Respondent's Supplemental Petition for a Writ of Federal Habeas Corpus, filed June 20, 1980 (Adamson v. Hill).

	TABLE OF CONTENTS—Continued	Page
16.	Transcript of September 26, 1980, Oral Argument before the Honorable Carl A. Muecke upon the first federal habeas petition.	124
17.	Judge Muecke's order dismissing the first habeas, filed September 26, 1980.	133
18.	Judge Muecke's order denying respondent's mo- tion to amend the findings and the judgment, filed October 21, 1980.	138
19.	Sentencing transcript of November 14, 1980 (excerpt—conviction for first-degree murder).	140
20.	Notice of appeal after denial of respondent's first federal habeas, filed November 18, 1980.	154
21.	Order of the Ninth Circuit in Adamson v. Hill, filed April 24, 1981.	155
22.	Memorandum Decision in Adamson v. Hill, filed November 30, 1981.	156
23.	Amended supplemental petition in Adamson v. Ricketts, the second federal habeas (excerpt), filed December 14, 1983.	164
24.	Respondent's motion to appoint additional counsel in Adamson v. Ricketts, filed December 8, 1983.	167
25.	Respondent's motion in Adamson v. Ricketts, for an evidentiary hearing, filed December 29, 1983.	169
26.	Ninth Circuit's en banc order of July 12, 1985	174
27.	Respondent's motion to augment the record in Adamson v. Ricketts, with the record in Adamson v. Hill, filed August 18, 1985.	175
28.	Ninth Circuit's order granting the motion to aug-	
29.	Ninth Circuit's en banc opinion in Adamson v. Ricketts 789 F 2d 722 filed Mar 9 1986	177

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

[Caption omitted]

JURY TRIAL, TWELFTH DAY:

MINUTE ENTRY OF JAN. 15, 1977

CHANGE OF PLEA:

11:15 a.m.: In open court: Defendant present in custody. Bruce Johnson reporting.

Mr. Friedl informs the court that the parties have reached a plea agreement and said written plea agreement is filed with the court.

Mr. Schafer files a letter dated January 14, 1977, to Hon. Ben Birdsall from William C. Smitherman, United States Attorney.

Also filed at this time are documents labelled Exhibit A and B to Plea Agreement, which documents are examined by the defendant and signed by him as being correct, and which are then sealed by the court and marked "To be opened only upon order of a Judge of the Superior Court," by order of the court.

Defendant verifies his signature on the Plea Agreement.

The court questions the defendant re his ability to enter into such a plea agreement.

The court advises the defendant re the nature of the crime of murder in the second degree.

The court questions the defendant re his understanding of each and every provision of the plea agreement.

Regarding Paragraph 5, Mr. Schafer states that there is another statement that was not taken by a court reporter but which was transcribed and is intended to be included by the parties.

Mr. Friedl states that the statement was given to defense counsel and that it is included by agreement of all parties.

Defendant states that this is his understanding.

Regarding Paragraph 12, the court questions counsel and each of them re the correctness of the statements in that paragraph and counsel and each of them state that the statements read by the court are true and correct.

Regarding Paragraph 13, the court reads into the record the letter from the United States Attorney filed this date.

Upon request of Mr. Feldhacker,

Mr. Schafer states that the documents the state provided to the U.S. Attorney for review were the transcribed statements referred to in the Plea Agreement: the statement given to defense counsel and the statement taken by the court reporter.

Regarding Paragraph 15, the court states that those matters (the transcribed statements and the testimony) could not be used against the defendant and would not be admissible if the plea is not accepted by the court.

The court advises the defendant of the constitutional rights he waives by entering a guilty plea, which rights are enumerated in Paragraph 17 of the Plea Agreement.

In response to questioning by the court, Mr. Adamson states that it is his desire to give up those constitutional rights.

Pursuant to Paragraph 18 of the Plea Agreement,

IT IS ORDERED that the defendant remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this Plea Agreement.

The attorneys and each of them verify their signatures on the Plea Agreement.

The court states that it will not sign the agreement this morning, and

IT IS ORDERED that that portion of the Plea Agreement will be "form filed" only and the court will sign and date that part of the agreement when the court has accepted all of the provisions of the agreement.

The court states that it has read and examined the Preliminary Hearing Transcript in this case and that it has read and examined (with the consent of all counsel) the police reports and the statements of all witnesses which have been taken and reduced to writing in connection with this particular case.

In response to questioning by the court, Mr. Adamson states how he was involved in the killing of Donald F. Bolles.

THE COURT FINDS that there is a factual basis for the defendant's plea of guilty to the crime of murder in the second degree.

The court questions the defendant re his satisfaction with the services of his court-appointed counsel and each of them.

The court advises the defendant of the provisions of the Arizona Rules of Criminal Procedure regarding the court accepting or rejecting the sentencing provisions of the Plea Agreement.

The court advises the defendant of his alternatives should the court reject the sentencing provisions of the agreement.

The court states that if it can accept the sentencing provision, the entire Plea Agreement will be accepted.

The court states that the Pre-Sentence report will be available to the court and counsel on January 18, 1977.

The court states that it will review the Pre-Sentence Report and will advise the defendant at a subsequent hearing whether or not the court is able to accept the sentencing provisions of the agreement.

IT IS ORDERED said hearing is set for January 19, 1977, at 10:00 a.m.

The court advises the defendant that he is entitled to have a pre-sentence report within two days prior to the date set for sentencing and in the event that is applicable in this case,

Messrs. Schafer, Feldhacker, and Adamson each state that they would waive that provision. The court advises the defendant of his right to enter a plea of not guilty at this time.

The court questions the defendant re any promises made to him in connection with the plea agreement which are not contained in the written Plea Agreement or which have not been discussed in court this morning: Defendant states that there have been none.

The court questions the defendant re any force (either physical or verbal) or threats which induced him to enter into the plea agreement: Defendant states that there were none.

The court questions the defendant whether it is still his desire to plead guilty to the crime of murder in the second degree as set forth in the Plea Agreement and as introduced on the record this morning: Defendant states that it is his desire to do so.

THE COURT FINDS that the defendant's plea is made voluntarily with a full understanding of the nature of the charges to which he is pleading guilty and with a full understanding of the sentence he will receive as set forth in the Plea Agreement.

THE COURT FURTHER FINDS that the defendant's plea is made intelligently and that the defendant is competent to enter the plea.

THE COURT ACCEPTS the defendant's plea.

The court hands Prof. George W. Rige, Court/News Liaison, copies of the Plea Agreement to be distributed among the news people when the court recesses. The court informs counsel that it is not going to discharge any of the jurors at this time; that the Jury Commissioner has been instructed to call all of the remaining jurors and tell them that they will not be needed at least until January 20, 1977.

12:10 p.m.: Prospective jurors reporting this date are brought into the courtroom, the clerk calls the roll (all 11 jurors are present), the jurors are admonished and excused subject to call.

12:15 p.m.: Court stands at recess.

FILED IN COURT: List of Jurors to report to Division IX, January 15, 1977; Plea Agreement (6 pgs); Exhibits A and B to Plea Agreement (sealed in envelopes); Letter to Hon. Ben Birdsall from William Smitherman (1 pg. + envelope).

cc:

Assistant Attorney General, William J. Schafer III Maricopa County Deputy County Attorney, G. Eugene Neil

Martin, Feldhacker & Friedl

Maricopa County Court Administrator, Gordon Allison

Pima County Jury Commissioner, Teal A. Harris

Hon. Ben C. Birdsall

Pima County Sheriff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

[Caption Omitted]

MINUTE ENTRY OF JANUARY 19, 1977 HEARING:

8:40 a.m.: In chambers:

Defendant not present.

Messrs. Neil and Friedl present.

Bruce Johnson reporting.

The court makes statements to counsel.

Mr. Friedl makes a statement to the court.

10:00 a.m.: In open court:

Defendant present in custody. All counsel present.

Bruce Johnson reporting.

James Muth, Maricopa County Adult Probation Officer, present.

The court states that it is not ready to proceed with this hearing at this time.

IT IS ORDERED the hearing is continued subject to call this date.

3:20 p.m.: In chambers:

Defendant not present. All counsel present.

Bruce Johnson reporting.

The court makes statements to counsel.

IT IS ORDERED that the court reporter's notes of the hearings held in chambers this date be sealed and placed in an envelope and delivered to the clerk of this court, the envelope to contain the language "To be opened and/or transcribed only upon order of a Judge of the Superior Court." (Clerk receives notes from court reporter.)

3:55 p.m.: In open court:

Defendant present in custody. All counsel present.

Bruce Johnson reporting.

James Muth, Maricopa County Adult Probation Officer, present.

The court having reviewed the Pre-Sentence Report and having considered further the Plea Agreement and all of the matters which have been before this court and the matters contained in the file in this case, the hearing in which the court accepted the defendant's plea of guilty to the crime of murder in the second degree, and the transcript of the Preliminary Hearing,

THE COURT FINDS that the provisions contained in the Plea Agreement regarding the sentence to be imposed upon the defendant are appropriate and the court will not reject those provisions and the defendant will be sentenced strictly in accordance with the provisions contained in the Plea Agreement.

IT IS ORDERED the sentencing date be subject to call.

IT IS FURTHER ORDERED the case is set for a Review Hearing on January 18; 1978. The court states

that counsel will be required to be present at that hearing, that the defendant is entitled to be present but the court would accept a written waiver of his presence if that is his desire. Further, counsel for either the state of [sic] the defendant will have the right to file a motion to set a date for sentencing in the event that both sides do not agree that the matter is ready for sentencing. The court states that if such a motion is filed, counsel are to follow the notice and time limit provisions of the Rules. Further, if counsel agree that the matter is ready for sentencing prior to the time set for the Review Hearing, counsel should so advise the court.

The court signs the Plea Agreement.

The court hands George W. Ridge, Court/News Liaison, copies of the Pre-Sentence Report to be made available to the news people at the conclusion of the hearing.

The court reads into the record the letter which will be sent to all of the remaining jurors.

4:10 p.m.: Court stands at recess.

FILED IN COURT: Plea Agreement, Jury List (Strike, 4 pgs), Exhibit List (Voir Dire), Request for Payment by Maricopa County for Services Rendered by KOOL Radio Television to Defendant.

FILED THIS DATE: Court Reporter's Notes of proceedings held in chamber on January 19, 1977 (sealed), Jury Service (sealed), Pre-Sentence Report.

cc:

Assistant Attorney General, William J. Schafer III Deputy Maricopa County Attorney, G. Eugene Neil Martin, Feldhacker & Friedl, 234 N. Central Ave, Suite 621, Phoenix, Arizona 85003

Maricopa County Court Administer, Gordon Allison Maricopa County Adult Probation Office, Attn: James Muth

Hon, Ben C. Birdsall

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

[Caption Omitted]

MINUTE ENTRY OF DECEMBER 7, 1978 SENTENCING:

DATE OF OFFENSE: On or about June 2, 1976

Defendant present in custody.

Bruce Johnson reporting.

Defendant having pled GUILTY to the crime of MUR-DER IN THE SECOND DEGREE, and no legal reason being shown why judgment should not now be pronounced.

IT IS THE JUDGMENT OF THE COURT that the Defendant is GUILTY of that crime.

The Court states that the Defendant's sentence is being limited by the terms of the Plea Agreement which was entered in this case and which was previously accepted by the Court, and the Court is going to proceed with the sentence in accordance with the Plea Agreement.

Mr. Schafer states to the Court that it may be necessary to bring the Defendant back for further testimony after the sentencing.

IT IS THE JUDGMENT AND SENTENCE OF THE COURT that the Defendant be sentenced to the custody of the Arizona State Department of Corrections for not less than forty-eight (48) nor more than forty-nine (49) years, to date from June 13, 1976, which is the date that the Defendant was first taken into custody on these charges.

The court states that the sentence is to be in accordance with paragraph number 13 of the Plea Agreement.

The Court advises the Defendant of his appeal rights. FILED IN COURT: Notice of Right to Appeal and Appeal Procedure.

The Court states that there is a sub-paragraph 11 in the Plea Agreement in regard to any appeal, and that form is further modified by that provision in the Plea Agreement.

IT IS ORDERED that the Defendant be remanded to the custody of the Pima County Sheriff.

/s/ Ben C. Birdsall Judge

cc:

William J. Schafer, III, Attorney General's Office, Phoenix, Az.

William Feldhacker, Esq., 10211 N. 32nd St., Bldg. G, Phoenix, Az. 85028

Gregory Martin, Esq., 10211 N. 32nd St., Bldg. G, Phoenix, Az. 85028 Pima County Sheriff (2 certified copies)

Arizona State Prison (2 certified copies)

Arizona State Department of Corrections (2 certified copies)

Adult Probation in Phoenix-

B. J. Davis-Main Office in Tucson

Hon. Ben C. Birdsall

Wilson D. Palmer, Maricopa County Superior Court, Clerk's Office

(Original is being sent to Mr. Palmer, plus a posting copy)

OF MARICOPA COUNTY

Minute Entry of May 12, 1980

This is the time set for hearing Defendant's Motion to Quash Warrant and to Strike Pleadings. State is represented counsel, William Schafer. Defendant is represented by counsel, William Feldhacker.

Court Reporter, LoAnn Durby, is present.

LET THE RECORD SHOW defense counsel waives the defendant's presence at this hearing.

Motion is argued to the Court.

IT IS ORDERED taking this matter under advisement.

LATER:

Defendant's Motion to Quash Warrant and to Strike Pleadings having been taken under advisement and the Court havin considered all memoranda submitted as well as oral arguments,

IT IS ORDERED Defendant's Motion is denied. Under State v. Rise, 99 Ariz. 14, 405 P2d 894 (1965) and State v. John, 97 Ariz. 27, 398 P2d 392 (1964), the Information filed is construed to be an amendment of the charges plead to in order to conform to the original charges.

FURTHER ORDERED the Stay, heretofore granted, is lifted.

FURTHER ORDERED the State's Order for Writ of Habeas Corpus Ad Prosequendum is granted and Order is signed by the Court this date.

FURTHER ORDERED that upon the Sheriff receiving the defendant, the Court Administrator's Office will schedule the Initial Appearance and then the Arraignment in the customary manner.

(p. 2) [Caption omitted]

[Change of Plea] Tucson, Arizona January 15, 1977

MORNING SESSION

The Court: This is Case No. CR-93385, Maricopa County, State of Arizona vs. John Harvey Adamson. This is the time set for continuing the voir dire examination of the jurors.

Is there anything to come before the Court?

Mr. Friedl: Yes, Your Honor. At this time the defense and the State of Arizona have reached a plea agreement and would like to approach the bench regarding that matter.

The Court: You may.

(Whereupon, a bench conference was had, to-wit:)

Mr. Friedl: I would at this time like to file the original plea agreement with the Court.

The Court: I'll have the clerk show it filed.

Anything further to be filed at this time?

Mr. Schafer: Yes, Your Honor. There are two exhibits, one labeled Exhibit A and one labeled Exhibit B, and a letter from the U.S. Attorney.

The Court: All right. Are these exhibits a (p. 3) part of the plea agreement?

Mr. Schafer: They are part of the agreement and they are referred to in the agreement as well as the letter.

The Court: All right. Have all counsel signed the letter?

Mr. Feldhacker: We have, Your Honor.

The Court: Defendant?

The Defendant: Yes, Your Honor.

The Court: All right. I'll have the clerk file the letter from the United States Attorney and that will remain open in the file.

Now, Exhibit A is unsealed and the Court is going to open it at this time and ask the defendant to examine it and see if it's correct and to sign his name to the sheet of paper if it is correct.

Then it will be handed to the clerk and be sealed and be opened only upon order of a Judge of the Superior Court.

(Whereupon, defendant signs a document.)

The Court: All right. That's been signed by the defendant in the presence of the Court in open court and I'm going to place it in the envelope, seal the envelope, and have this filed as an Exhibit A to the (p. 4) plea agreement with the instructions on the envelope that I gave you.

Now, I'm going to follow the same procedure with regard to Exhibit B. I have opened that and I'll hand Mr. Adamson the document that's inside the envelope, Exhibit B.

(Document handed to Mr. Adamson, who thereupon signs it.)

The Court: That's been signed by Mr. Adamson in open court.

I'm going to place that in the envelope, Exhibit B, and hand it to the clerk for filing, same instructions.

Now, would everybody stand back just a little bit because it's more comfortable to talk when you're back just a little bit.

(Open court.)

The Court: Mr. Adamson, I want to begin, sir, by saying to you that the Court has before it this written plea agreement and I have had an opportunity to read it before coming into court this morning.

I want to advise you, sir, that except as set forth in the plea agreement, if the Court accepts your plea and the plea agreement this morning, subject only to the matters that are set forth in the plea (p. 5) agreement, and subject also to the fact that the plea agreement contains provisions regarding your sentencing which the Court will still have an opportunity to reject, and I'm going to explain that to you during the proceedings, if you enter this plea this morning the plea is entered and it cannot be withdrawn.

Do you understand that, sir?

The Defendant: I do.

EXAMINATION

By the Court:

- Mr. Adamson, how old are you?
- Thirty-three years old, sir.
- And how much formal education have you had?
- Sixteen years.
- Sixteen years?

- A. Yes, sir.
- That would be-
- Through college, I believe.
- You are a college graduate.
- No, sir. I never graduated.
- But you did have four years of college.
- Yes, sir.
- Have you ever had any mental illness or disease?
- A. No, sir.
- (p. 6) Q. Are you under the influence of any drugs or alcohol or anything else here this morning?
 - A. No, sir.
- Q. The Court does understand that you have been taking tranquilizers; is that correct?
 - A. Yes, sir.
 - And you are still taking that?
 - A. Yes, sir.
- Q. Does that in any way affect your ability to understand or comprehend what is going on here this morning?
 - A. No, sir.
- Q. Mr. Adamson, you initially plead not guilty to the charge of murder in this case, specifically to the charge that you murdered Donald F. Bolles on or about June 2, 1976, in Maricopa County, Arizona.

I now have before me this plea agreement in which you are agreeing to plead guilty to murder in the second degree. I want to go through the plea agreement with you, I want to make certain that you understand everything that is in it, and if you have any questions I want you to speak up, sir, and tell the Court.

- A. All right.
- Q. First, I want to tell you that the nature of the crime of murder in the second degree is the unlawful (p. 7) killing of a human being with malice, and malice is defined as having the intent to kill.

Do you understand, sir, that that is the nature of the charge that you are pleading guilty to?

- A. I do.
- Q. All right. And in this particular case that this is murder in the second degree, the murder of Donald F. Bolles on or about June 2, 1976, in Maricopa County, Arizona.
 - A. That is correct, sir.
- Q. The plea agreement—we have got six pages of it, counting all the signatures—have you, sir, read that plea agreement?
 - A. I have.
- Q. And is this your signature on Page 5 of the original of the plea agreement?
 - A. It is.

And have you gone over this plea agreement, sir, with your counsel?

- A. I have.
- Q. And were all three of them present at that time?

- A. They were.
- Q. At this point do you believe that you understand the provisions of the plea agreement?
 - A. Entirely, sir.
- (p. 8) Q. Do you have any questions that you want to ask me about it before we go any further?
 - A. No, sir.
- Q. All right. Now, the second paragraph of the plea agreement sets forth the statutory range of sentence for murder in the second degree and says that that is probation if no sentence is imposed and ten years—not less than ten years, and it could be up to life, if sentence is imposed.

The third paragraph of the agreement contains a provision with regard to the sentence which counsel and yourself, I take it, have agreed will be imposed in this case.

I would like to go through that with you next, sir.

The agreement provides that you shall receive a sentence of not less than 48 years and not more than 49 years imprisonment in the Arizona State Prison—and I'll cover that with you later—the sentence to commence June 13, 1976.

It then goes on that the parties agree that the defendant shall be incarcerated for a total of 20 calendar years and two calendar months and that the sentence, the minimum of 48 years and the maximum of 49 years, when computed with the statutory credits that are (p. 9) provided for under our law, will not permit you to complete the service of the maximum sentence of 49 years until that time has passed, that is, 20 years and two calendar months.

The agreement provides that you will be incarcerated for no longer than 20 years and two calendar months.

Further, it provides that you will not apply for or be eligible for parole until 20 calendar years and two calendar months have passed.

Now, let me say to you, sir, in that regard that it is the Court's understanding of the law that except for this provision in the agreement you would have been eligible under this sentence to apply for parole at an earlier time. You are giving up that right as part of this agreement.

Do you understand that, sir!

- A. I do, sir.
- Q. The agreement provides that in the event you do apply for parole prior to the 20 years and two months, that the agreement would be null and void and the original charges would be reinstated automatically against you.

In that same paragraph it's agreed that if for any reason the statutory time credits the defendant earns while incarcerated are taken away from him through (p. 10) no fault of his, including time spent in protective custody, whether requested by the defendant or ordered by the authorities, the sentencing court will recompute the length of the sentence so that the defendant will not be incarcerated for any period longer than 20 calendar years and two calendar months.

Now, the Court understands that means that in the event that some of the credits to which you would be entitled under the computation that has produced the 20 years and two months were taken away from you without you having done anything wrong, that you would come back

into court and your sentence would be—there would be a new sentence pronounced and that that sentence would be such, sir, that you would be released within 20 years and two months, that is, having completed that total time.

Is that the way you understand that, sir?

- A. That is my understanding, sir.
- Q. Paragraph 4 of the plea agreement, the defendant hereby agrees to testify fully and completely in any court, state or federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles and in the beating of Leslie Baros at the Sheraton, Scottsdale, Maricopa County, Arizona, and any and all of the parties involved in the crimes listed in Exhibits A and B filed with this court as part (p. 11) of the agreement this date. Now, those are the exhibits that we just went through.

The contents of crimes and persons listed in Exhibits A and B shall remain sealed from public view until all of the individuals listed therein have been taken into custody or until they have had charges filed against them or until the State agrees that the contents be made public.

Those are the envelopes that we have filed with the clerk of the court.

Let me ask you, sir, if there is anything about that Paragraph 4 of the plea agreement that you have any question about?

- A. No question, Your Honor.
- Q. Paragraph 5 provides that you will testify truthfully and completely at all times whether under oath or not to the crimes mentioned in this agreement.

This shall include all interviews, depositions, hearings and trials. Should you refuse to testify or at anytime testify untruthfully, if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges in this case would again be automatically reinstated.

(p. 12) Do you understand that part of Paragraph 5 so far?

A. Yes, sir.

Q. These statements that that makes reference to are statements that the Court understands you have given since you were transferred here to Pima County and they were taken by a court reporter and have been transcribed.

Is this the way you understand it?

A. Yes, sir.

Mr. Schafer: Your Honor, may I interrupt a mo-

The Court: Yes.

Mr. Shafer: There is another statement that was not taken by a court reporter, but which was intended to be — by all parties intended to be included in here. That was transcribed, but not by a court reporter.

Mr. Friedl: Those were statements that Mr. Adamson gave to his counsel, Mr. Feldhacker, Mr. Martin and myself.

Q. (By the Court) That is included when we talk about statements. Do you understand that, Mr. Adamson?

A. I do.

Q. Now, the agreements — then the rest of Paragraph 5 then sets forth that the defendant will be subject to the charge of open murder and if found guilty (p. 13) of first degree murder to the penalty of death or life imprisonment requiring a mandatory 25 years actual incarceration and the Court shall be free to file any charges not yet filed as of the date of this agreement.

That, sir, is what would happen in the event that this agreement became null and void for any reason and the charges were then reinstated. Do you understand that?

A. Yes, sir.

Q. Now, Paragraph 6 contains what I think I can categorize as some promises made to you.

It reads the parties agree that the State will not prosecute the defendant for the following crimes, I'm going to go through these and read these to you, sir.

Those he will testify to which are mentioned in this agreement and listed in Exhibits A and B which are a part of this agreement.

Those where the defendant's involvement is presently known to the police and the subject of police reports.

Those which are material to the correct testimony of the defendant in relation to the crimes listed in this agreement and Exhibits A and B.

Those crimes which the defendant has revealed to the State in transcribed statements and those (p. 14) presently filed and now pending against the defendant.

The pending cases against the defendant in the Maricopa County Superior Court will be dismissed with prejudice at the time of your sentencing.

The defendant is to be severed in those cases from any other defendants.

Is there anything, sir, in Paragraph 6 as I have read it to you and explained it that you do not understand?

- A. I understand everything you have read and explained, Your Honor.
- Q. Paragraph 7, the parties agree that the defendant will not testify to any of the matters referred to in this agreement until Judge Birdsall has accepted all the terms and conditions of this agreement.

That's self-explanatory, I think. Anything about that, Mr. Adamson, that you do not understand?

- A. I understand that, Your Honor.
- Q. Paragraph 8, all parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibit A and B, which accompany it.

Now, you understand, sir, that you are entitled under our Rules of Criminal Procedure to be (p. 15) sentenced within 30 days from the date of the acceptance of your plea agreement and by this provision in the agreement you are waiving that time for sentencing and agreeing that the sentencing may occur at some date in the future when all of your testimony in the various cases has been accomplished. Do you understand that?

- A. I do, Your Honor.
- Q. Are you willing, sir, to so waive that time?
- A. I am.
- Q. Paragraph 9. The parties agree that in case of the resignation or death or incapacitating illness of the Judge assigned to this case that's myself at the present time any Superior Court Judge assigned for that purpose by the Presiding Judge of Maricopa County may sentence the defendant in accordance with the terms of this agreement and thereby be bound by the terms of this agreement.

Anything about that, sir, that you have any question about?

- A. No, sir.
- Q. Paragraph 10 provides that the sentencing, your sentencing, may be in any court house in any county seat or any other place designated by the sentencing judge in the State of Arizona in accordance with Arizona Rules of Criminal Procedure and Arizona Revised Statutes (p. 16) Section 12-130-C.

That, sir, is a statute that provides that the court can be held anywhere in the county if so designated by a judge.

Do you understand that paragraph, sir?

- A. I do.
- Q. Paragraph 11 provides that you will not appeal from the judgment and sentence entered herein except as may be necessary to recompute your sentence to insure that you be incarcerated not longer than 20 calendar years and two months.

If you should appeal from this plea agreement, except as noted herein, then the plea agreement would be null and void and all the original charges reinstated. Do you understand that?

- A. I do, Your Honor.
- Q. Paragraph 12, I'm going to read verbatim.

It is understood by all parties at this time, and at all times in the past, that the only party with full authority to enter into any plea negotiations with you has been William J. Schafer III of the office of the Arizona Attorney General, and that any offers alleged to have been tendered by any member of the office of the Maricopa County Attorney, and specifically Mr. Donald W. Harris, were made without authority. It is (p. 17) specifically denied by counsel for the defendant that Donald W. Harris ever made any firm offer of ten years actual incarceration to the defendant in exchange for a plea of guilty.

Mr. Adamson, do you have any question about Paragraph 12 as I have just read it to you?

A. No. sir.

The Court: Now counsel for the defendant, you have each signed the plea agreement. Since this paragraph makes specific reference to you, I'll ask each one of you if the statement read by the Court is true and correct.

Mr. Feldhacker.

Mr. Feldhacker: That being true and correct.

The Court: Mr. Martin.

Mr. Martin: That is true and correct.

The Court: Mr. Friedl.

Mr. Friedl: That is true and correct, Your Honor.

The Court: All right.

Mr. Friedl: Would you care to verify that with the attorney general and the county attorney who are here?

The Court: Mr. Neil?

Mr. Neil: That is correct, Your Honor.

The Court: Mr. Shafer.

Mr. Schafer: Yes, Your Honor.

(p. 18) Q. (By the Court) Paragraph 13 concerns federal immunity. It says that any federal immunity for you, sir, will be in accord with a document from the U.S. Attorney filed with the Court on this date. I will ask the clerk to hand me that document.

I think I'll read it, sir, and ask you if this is the way that you understand it.

It's addressed to me, the title of the case, dated January 14, 1977. To the extent that John Harvey Adamson's statements made to the State, which have been transcribed and read by this office, constitute a violation of the laws of the United States, the defendant, John Harvey Adamson, is granted immunity from prosecution. Signed by William C. Smitherman, United States Attorney.

Is that the immunity which you understood, sir, you would receive as part of this plea agreement from the federal authorities and is it satisfactory?

A. It's what I understood I would receive and it is satisfactory, Your Honor.

Mr. Feldhacker: Your Honor, as to that document, I would ask if the State would make a comment for the record as to what documents they actually provided to the U.S. Attorney for their review.

Mr. Schafer: We provided, Your Honor, before that letter was sent, the same statements, transcribed (p. 19) statements, that have been referred to in the plea agreement.

One statement consists of a transcribed statement taken by the court reporter.

The other consists of a transcribed statement that was given to the three attorneys before the statement given to the court reporter.

The Court: Satisfactory?

Mr. Feldhacker: That was my understanding, Your Honor, yes.

Q. (By the Court) Paragraph 14 provides that you will serve the agreed upon sentence in a prison outside the State of Arizona.

Paragraph 15 — I take it, sir, that that's satisfactory with you and in fact what you want.

A. Yes, sir.

Q. Paragraph 15, in the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement. I understand that to mean, sir, that you would be facing the

charge of open a der as you were when you first came into this court.

A. Yes, sir.

Mr. Schafer: Your Honor, I think it's also known by all of us, but we would also be in the same (p. 20) position as we were with reference to the transcribed statements that Mr. Adamson gave.

Mr. Friedl: And any testimony he would have given.

The Court: Yes, that those matters could not be used against him.

Mr. Friedl: Correct, Your Honor.

Q. (By the Court) And that is provided in our law, that the statements given by you during the plea negotiations are not admissible against you if the plea agreement is not accepted by the Court.

Item 16, unless the plea is rejected or withdrawn, the defendant hereby gives up any and all motions, defenses, objections, or requests he has made or raised or could assert hereafter to or against the court's entry of judgment and imposition of sentence upon him consistent with this agreement.

Do you understand that, sir!

A. I do.

Q. I'll repeat to you again at this point that if the plea is accepted here this morning, except for the matter of recomputation of sentence, the plea cannot be withdrawn. I say that because the language withdrawn is used in that paragraph.

Do you understand that?

- (p. 21) A. I understand it, Your Honor.
- Q. Now, the rejected part of it, I think that refers to the sentencing provisions and I'm going to completely go through that with you a little later.

Paragraph 17, if the Court accepts your plea of guilty as set forth in this plea agreement to the crime of murder in the second degree, there are certain constitutional rights which you are waiving and they are set forth here in Paragraph 17.

I want to go over them with you at this time, sir, and make sure that you understand them and that you further understand that by entering a plea at this time you are waiving those rights.

First of all, you have a right to a speedy public trial by a jury. And we have been sitting here for into the third week going through the jury selection process.

Secondly, you are entitled to confront the witnesses that appear to testify against you and to cross-examine them, and to cross-examine them with the assistance of your counsel.

Third, you have the right in the trial of the case, but no obligation to do so, to present evidence in your own behalf and to compel the attendance of witnesses through court process and to have them required (p. 22) to attend.

Fourth, you have the right to be represented by counsel at all times during the trial of the case and by counsel appointed for you at the cost of the—in this case Maricopa County—if you can't afford to employ counsel.

Lastly, you, sir, have the right to be a witness in the case yourself if you desire to be a witness. On the other hand, you have a right to remain silent and not testify as a witness unless you decide to do that. And you have the complete right to remain silent and not answer any questions concerning the charges against you.

You have the presumption that you're innocent unless and until you are proven guilty beyond a reasonable doubt.

Now, on the matter of testifying as a witness or remaining silent, I want to advise you. sir, you, of course, have the right to the advice of your court-appointed counsel in making a decision on that particular point.

Mr. Adamson, do you understand these constitutional rights, do you understand that you're giving them up if the Court accepts your plea of guilty here today?

- A. Yes, sir.
- (p. 23) Q. Is it your desire to give up these constitutional rights?
 - A. It is.
- Q. All right. The plea agreement last provides the defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement.

The plea agreement then reads, I, John Harvey Adamson, have read this agreement with the assistance of counsel, understand its terms, understand the rights I give

up by pleading guilty in this matter, and agree to be bound according to the provisions herein.

It's dated January 15, 1977, and your signature, which you have already acknowledged.

The last page we have discussed, this case and the plea agreement with the defendant, we have advised him of his rights and the conditions of his plea and we concur in his entry of this plea. That's dated January 15, 1977.

Mr. Friedl, is this your signature on the top line?

Mr. Friedl: Yes, it is, Your Honor.

The Court: And, Mr. Martin, is this your (p. 24) signature on the second line?

Mr. Martin: Yes, it is.

The Court: And, Mr. Feldhacker, your signature on the third line?

Mr. Feldhacker: It is, Your Honor.

The Court: We have reviewed this agreement and agree on behalf of the State of Arizona that the terms and conditions set forth herein are appropriate and are in the interests of justice. Dated January 15, 1977.

Mr. Schafer, is this your signature on the first line?

Mr. Schafer: Yes, it is, Your Honor.

The Court: Mr. Eugene Neil, is this your signature on the second line?

Mr. Neil: Yes, Your Honor.

The Court: Now, the last part of that page contains this language.

The Court has read all of the provisions of this agreement and accepts them. There is a date line and a signature line for my signature.

The Court is not going to sign this agreement this morning and it will be filed as the plea agreement, but that portion of it will be filed only and the Court will sign and date that part of the plea agreement when the Court has accepted all of the (p. 25) provisions of the agreement and not until then.

Now, Mr. Adamson, first, I want the record to show that the Court has read and examined the preliminary hearing transcript in this case, the hearing before the Justice of the Peace where you were bound over for trial to the Superior Court.

In addition, the record should show that the Court has examined and read during the last couple of weeks, with the consent of all counsel, the police officers' reports, supplements, and the statements of all witnesses which had been taken and reduced to writing in connection with this particular case.

- Q. (By the Court) At this time, sir, I want to ask you—and this is in order to further establish a factual basis for your plea of guilty to the crime of murder in the second degree—I want you to tell the Court, sir, just what you did in connection with the death of Mr. Donald F. Bolles.
- A. On June 2, 1976, in the parking lot of the Clarendon Hotel I placed a bomb containing dynamite underneath the vehicle driven by Don Bolles to be detonated

at a later time with the express purpose of killing him. And he died 11 days later subsequent to that explosion.

- Q. Did you bring the bomb yourself to the automobile?
 - (p. 26) A. I did.
- Q. And as I understand it, you placed it under the car.
 - A. That's correct, Your Honor.
- Q. And did you, sir, do anything with reference to getting Mr. Bolles to the Clarendon Hotel on that date?
 - A. I did, sir.
- Q. And what if anything did you have to do with reference to instructing anyone concerning the discharge of the bomb?
- A. I made a phone call to an individual and told him where Mr. Bolles would be at a specific time and to—where—where it was arranged that the bomb was to be detonated.
- Q. Did you, sir, do anything to advise the individual when the bomb was to be detonated? That is, when Mr. Bolles was going to enter the car?
 - A. Yes. But-yes, I did.
 - Q. What did you do in that regard, sir?
- A. Well, the conversation ensued prior to Mr. Bolles arriving at the Clarendon House. It was arranged what was—was to be done after he left Clarendon House and entered his car.

And that's when the explosion was to occur.

- Q. When he left the Clarendon House and returned (p. 27) to his automobile where the bomb had already been placed by you; is that right?
 - A. Yes, sir.
- Q. You said this to me, but I want to make sure that I understand you correctly. You procured the bomb, you took it to the car, you put it under the car, and you made arrangements to have it detonated all with the specific intent to kill Mr. Bolles; is that right?

A. Yes, sir.

The Court: All right. Let the record show that at this time the Court finds that there is a factual basis for the defendant's plea of guilty to the crime of murder in the second degree.

Q. (By the Court) Mr. Adamson, you have been represented in this case since the beginning by three court-appointed attorneys.

Let me ask you, first, sir, if you are satisfied with the legal representation which these attorneys have given to you in this case?

- A. In every way, Your Honor.
- Q. Specifically, Mr. William H. Feldhacker. Are you satisfied with the legal representation which he has individually given to you in this case?
 - A. I am.
- Q. Mr. Gregory Martin, are you satisfied with the (p. 28) services that he has given you as another one of your attorneys in this case?

- A. I am, Your Honor.
- Q. And are you satisfied, sir, fully with the services given to you by way of legal representation by Mr. William J. Friedl?
 - A. I am, Your Honor.
- Q. Do you have any complaints at all concerning the manner in which they have represented you as your attorneys in this case?
 - A. Absolutely none.
- Q. Is there anything that you have suggested to them by way of investigation or leads or talking to witnesses or anything of that nature that you have any complaint about?
 - A. None whatsoever.
- Q. All right. Now, Mr. Adamson, this plea agreement contains a specific provision as to what your sentence is to be.

We have a Rule of Criminal Procedure which covers this kind of a situation and I want to go over the material part of that rule with you at this time.

The rule provides that the parties may negotiate concerning and reach an agreement on any aspect of the disposition of the case. The Court shall not (p. 29) participate in any such negotiation.

I want to go on the record at this time that the Court has not participated in any plea negotiations with reference to this case.

Mr. Adamson, do you have any reason to believe anything to the contrary?

A. I have no reason to believe anything to the contrary, Your Honor.

The Court: Counsel, is the Court's statement correct?

Mr. Schafer: It is correct.

Mr. Feldhacker: It is, Your Honor.

The Court: I take it Mr. Schafer and Mr. Feldhacker speak for all of you?

Subparagraph D of the rule that I'm going over with you provides that after making certain determinations, and those are determinations that you understand and agree to the terms of the plea agreement, and that the plea is entered in conformance with the other provisions of our law, the Court shall either accept or reject the tendered negotiated plea, and I'm going to do that, sir, here this morning.

It then provides, the rule provides, the Court shall not be bound by any provision in the plea agreement regarding the sentence if, after accepting (p. 30) the agreement and reviewing a presentence report, it rejects the provision as inappropriate.

Now, to put that in my own words, sir, and explain what that part of the rule so far means to you, it means the plea agreement provides that you will be sentenced to not less than 48 nor more than 49 years at the Arizona State Prison commencing this date.

If the Court after receiving a presentence report believes that that sentence is inappropriate, the Court has a right to take some action in that regard. And what the Court would do at that time, if the Court found that the sentencing portion of the agreement was not satisfactory, would be to give you, sir, an opportunity to withdraw your plea and at the same time to advise you that if you permit the plea to stand that the disposition of the case might be less favorable to you than that contemplated by the agreement.

If you then, sir, did withdraw your plea, upon your request I, as the Judge, would disqualify myself from any further participation in this case.

Now, to explain that a little more fully, Mr. Adamson, I have already commenced having a probation officer from Maricopa County given the preparation of a presentence report for the Court. In connection with that, he has in fact interviewed you and I believe that (p. 31) you knew that is what he was doing, that was the purpose of the interview.

- A. That is correct, Vour Honor.
- Q. I will have presentence reports available to me and available to your counsel and by that reason available to you on Tuesday of next week. That would be Tuesday, January the 18th.

I am going to set a hearing in this matter for Wednesday morning, January the 19th, at 10:00 a.m. I am going to review the presentence report and expect to be able, and if I'm able at 10:00 a.m. on Wednesday, the 19th, advise you whether or not the Court is able to accept the sentencing provisions in the plea agreement.

If the Court can accept the sentencing provisions in the plea agreement, then the entire plea agreement will be accepted.

If the Court cannot, then I would follow the procedure I have outlined in the rule.

Do you understand all of that?

- A. I do, Your Honor.
- Q. All right. By the way, you are entitled, under our rules, to have a presentence report within two days prior to the date set for sentencing. You, of course, are not actually going to be sentenced on Wednesday, January the 19th, but in the event that that two-day rule (p. 32) is applicable, I'm going to ask counsel and the defendant if they waive that portion of the rule.

Mr. Schafer: We do, Your Honor, the State.

Mr. Feldhacker: We do on behalf of the defendant, Your Honor.

The Court: Mr. Adamson?

The Defendant: Yes, sir, I do, also.

Q. (By the Court) The rule says that I should advise you at this time of your right to plead not guilty.

You understand, sir, that I haven't accepted the plea yet and you still have a right to continue with your plea of not guilty?

- A. I do, sir.
- Q. Now, I have gone over this plea agreement with you and I'm going to ask you, sir, if there have been any promises of any kind whatsoever made to you in connection with this plea which are not contained in this plea agreement or which we have not discussed openly here in court this morning?
 - A. No, sir, there have not been.
 - Q. Are you certain of that, sir?
 - A. I'm positive of it, sir.

Q. All right. Let me ask you next if there is anyone, attorney, police officer, anybody else, who has in any way forced you to enter into this plea agreement?

(p. 33) A. No, sir.

Q. Either physically or through any kind of verbal persuasion?

A. No. sir.

Q. All right. Next, let me ask you if there is anyone at all, attorney, law enforcement officer, anyone else, who has made any threats upon you, sir, which have in any way resulted in your making this plea agreement?

A. No, sir, there haven't been no threats of any kind.

Q. When I was advising you, sir, of the constitutional rights that you are waiving by reason of making this plea agreement, there may be one that I omitted and I'm going to cover it right now just to make certain.

Did I advise you, sir, that you have a right to be represented by your court-appointed attorneys at all times throughout the course of the trial? I think I remember now that I did.

A. You did and I understand it.

Q. You understand that.

A. I do.

The Court: All right. Counsel for the State, except for making some findings, is there anything that you think the Court has omitted?

(p. 34) Mr. Shafer: I don't think so, Your Honor.

The Court: Counsel for the defendant?

Mr. Feldhacker: Nothing that I am aware of, Your Honor.

The Court: All right. Mr. Adamson, is it still your desire, sir to plead guilty to the crime of murder in the second degree as set forth in the plea agreement and as we have discussed it here on the record this morning?

The Defendant: It is, Your Honor.

The Court: Do you have any questions of any kind that you want to ask me about the plea agreement or about the entry of the plea?

The Defendant: No, Your Honor, I have no question.

The Court: The Court finds that the defendant's plea is made voluntarily with a full understanding of the nature of the charge to which you are pleading guilty, with a full understanding of the sentence which the plea agreement sets forth that you will receive, that it is made intelligently, and that the defendant is competent to enter the plea.

The Court is going to accept at this time the defendant's plea to the charge of murder in the second degree and the Court will set 10:00 a.m., Wednesday, (p. 35) January 19th, as the time for further proceedings in this matter.

Is there anything further that counsel or the defendant have to come before the Court?

Mr. Schafer: No, Your Honor.

Mr. Feldhacker: Nothing from the defense, no, Your Honor.

Mr. Friedl: No, Your Honor.

The Court: Will you be seated.

(Whereupon, the Court proceeded with other matters.)

(p. 36)

Tucson, Arizona January 19, 1977

The Court: Case No. CR-93385, State of Arizona vs. John Harvey Adamson.

The record may show that defendant and counsel are all present.

The Court is not ready to proceed with this matter at this time and it's going to be continued subject to call today.

We'll stand at recess.

(Whereupon, court recessed at 10:01 a.m.)

(Open Court at 3:50 p.m.)

The Court: The Court apologizes, ladies and gentlemen, for the delay which we have had today.

The Court was attempting to check out last minute information which might have pertained to this hearing.

The Court has received a presentence report. It was received yesterday and the Court has reviewed that report.

May the record show that each counsel has received a copy of that report.

Mr. Schafer: That's true, Your Honor, we have.

(p. 37) Mr. Feldhacker: We have, Your Honor.

The Court: Very well. Having reviewed that report and having considered further the plea agreement and all of the matters which have been before this Court, and the matters contained in the file in this case, the hearing in which the Court accepted the defendant's plea of guilty to the crime of murder in the second degree last Saturday, the transcript of the preliminary hearing which the Court read, the Court finds that the provisions contained in the plea agreement regarding the sentence to be imposed upon the defendant are appropriate and the Court is not going to reject those provisions.

The defendant will be sentenced strictly in accordance with the provisions contained in the plea agreement.

Now, the sentencing date will be subject to call. However, we have a policy and a practice in this court that we never leave any criminal case pending on a subject-tocall basis and the Court is going to set a review hearing in this matter for one year from this date, January the 18th, 1978.

The purpose of this being, I know that it would not happen in this case, but the purpose of this policy and practice being so that we will not lose any criminal cases or any defendants. We had that experience (p. 38) once and that's when this policy was adopted.

Counsel will be required to be present at that hearing. The defendant is entitled to be present at that hearing. The Court would accept a written waiver of the defendant's presence for that hearing if that's what is desired.

The purpose of the hearing is to advise the Court as to what progress has been made in the case and to advise the Court in this instance as to when the sentencing date might be set.

Now, in addition to that, counsel for either the State or the defendant will have the right to file a motion to set the date for sentencing the defendant. This is in the event that you do not agree that the matter is ready for sentencing.

If such a motion is filed, you are to follow the notice and time limit provisions of the rules.

If counsel do agree prior to the date of the review hearing that the matter is ready for sentencing, you can jointly advise the Court in any manner you wish informally, if you so desire, that the sentencing date should be set.

Do counsel have any questions concerning this?

Mr. Schafer: No, we have no questions, Your (p. 39) Honor.

Mr. Feldhacker: Yes, Your Honor. The only question is if Your Honor has placed your signature on the plea agreement as having been accepted.

The Court: I have done so at this time and I'm handing it back to the clerk.

I want to commend the probation officer who prepared the presentence report, Mr. Jim Mooth, I think, with the Maricopa County Adult Probation Department.

Knowing that there would be—this is a public document and knowing there would be interest in the report, I have prepared copies of the report and I'm going to give them to Mr. Ridge at the conclusion of this hearing, I'll give them to you right now, and he'll make them available to the news persons.

I wanted to take this opportunity to thank Mr. Ridge for acting as the Court's liaison with the news persons during the proceedings in this case and I want to thank the news people for the cooperation which you have given to him and to the Court.

I know that we did not have a trial in this case and did not even complete the jury selection, but the case has presented considerable strain upon the court personnel involved and I want to thank my own staff, both in the courtroom and cutside of the courtroom, for the (p. 40) extra effort that they have put forth with regard to the case, including the courtroom clerk.

I'm going to permanently excuse all of the jurors who have not heretofore been excused and I have written a letter which is gong to go to all of the remaining jurors and I would like to read that letter into the record.

Dear Juror, re State vs. Adamson. All of the jurors in this case are now permanently excused since the defendant entered a plea of guilty to the charge of murder in the second degree. You should not think your time was wasted since it was your presence and availability that made this possible. As the trial judge I was deeply moved by the willingness of so many jurors to make personal sacrifices in order to perform their civic responsibility as a juror. You might be interested in knowing that it has been my prior experience as a judge with jurors, but it never ceases to amaze me that it's so relatively easy

for us to get persons of your caliber who recognize the need for doing this. I'm sorry so many of you were kept waiting so long and so many different periods of time, but that was also necessary.

I want to also thank the Pima County Sheriff's Department for the security that they have provided during this proceeding, these proceedings. I (p. 41) think it's been excellent and I hope everyone recognizes that they have also put in extra time and gone out of their way to do this.

If I have omitted anyone, I'm sorry.

Is there anything further to come before the Court?

Mr. Schafer: I don't believe so, Your Honor.

Mr. Friedl: No, Your Honor.

The Court: All right. We stand at recess.

(Whereupon, court recessed at 4:10 p.m.)

(p. 42)

Sentencing Tucson, Arizona December 7, 1978

The Court: In the Superior Court of the State of Arizona in and for the County of Maricopa, Case No. CR-93385, State of Arizona vs. John Harvey Adamson.

This is the time set for sentencing.

Would you come forward, please.

Mr. Adamson, first of all, I want to ask you if you are satisfied with the legal services that your attorneys have given you in this case?

The Defendant: Yes, sir.

The Court: Thank you. Mr. Adamson entered a plea of guilty in this court to the crime of murder in the second degree.

Is there any legal cause to show why judgment should not now be pronounced?

Mr. Feldhacker: There is none, Your Honor.

The Court: All right. No legal cause appearing, it the judgment of the Court that the defendant is (p. 43) guilty of that crime.

I'll hear from you now with regard to the sentencing.

Mr. Martin: We have nothing to say.

Mr. Feldhacker: Nothing on behalf of the defendant.

The Court: Mr. Adamson.

The Defendant: Nothing at this time, Your Honor.

The Court: All right. The Court's sentencing is limited by the terms of the plea agreement which was entered in this case, which was previously accepted by the Court and the Court is going to proceed with the sentencing in accordance with that plea agreement.

Do you have anything, Mr. Schafer?

Mr. Schafer: Yes. I would like to add one thing.

I wish the record would show that it has been discussed with counsel, and I believe counsel has discussed it with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.

The Court: The record may show that.

Mr. Feldhacker: That's our understanding.

Mr. Martin: That's correct.

(p. 44) The Court: All right. It is the sentence of this Court that the defendant be sentenced to the custody of the Arizona State Department of Corrections for not less than 48 nor more than 49 years, to date from June 13, 1976, which is the date that the defendant was first taken into custody on these charges. The sentence to be in accordance with numbered paragraph 3 of the plea agreement.

Now, Mr. Adamson, at this time I will notify you that you have a right to appeal from the judgment of guilt and from the sentence which has just been pronounced, except as your right of appeal is affected by the terms of your plea agreement.

You have a right to be represented by attorneys in connection with that appeal and if you cannot afford an attorney, to have an attorney appointed to represent you. The attorneys who presently represent you in court will continue to represent you unless and until some change is made for purposes of any appeal.

Do you understand these rights?

The Defendant: I do.

The Court: Now, under our rules, the clerk is required at this time to give you a written notice of your right of appeal and she has that form and she is going to give it to you and I'm gong to ask you to (p. 45) please acknowledge receipt of the form.

(Whereupon, defendant signs a document.)

The Court: Now, that formal notice of your right of appeal is—there is also a provision in Subparagraph 11 of the plea agreement with regard to any appeal and that form is further modified by that provision in the plea agreement.

Is there anything further?

Mr. Schafer: The State has nothing further.

Mr. Feldhacker: Nothing on behalf of the defendant.

The Court: It is ordered that the defendant be remanded to the custody of the sheriff.

We stand at recess.

(Whereupon, court recessed at 2:50 p.m.)

(p. 2) [Caption omitted]

Phoenix, Arizona April 18, 1980 [Excerpt]

PROCEEDINGS

Mr. Feldhacker: Your Honor, may I be heard on the ruling of the Court directing my client to answer the question?

The Court: You may.

Mr. Feldhacker: The prosecutor has presented to the Court a plea agreement as an exhibit in my client's case, Criminal Cause 93385, that was transferred to Pima County and presided ever by Judge Birdsall. My client has invoked his Fifth Amendment privilege on the basis of the last question. The Court has indicated that it believes that this is simply a yes or no answer, which is true. However, I might submit to the Court that I believe that my client is now, pursuant to correspondence from the prosecution, subject to being prosecuted for the killing of Donald Bolles on a first degree murder charge.

I also believe that they may intend to use certain evidence against him that they have received as a result of many conversations they have had with John in the past. Based on that belief, I think the question that has just been posed to Mr. Adamson is in fact a foundational question that they may raise when they are trying to present evidence against him. (p. 3) in other words, foundation of a time, place and area of conversation. And

for those reasons and because that can be a foundational question for incriminating evidence, I think that we have directed our client appropriately to refuse to answer based on the Fifth Amendment.

Mr. Feidhacker: It would be Mr. Adamson's position, Your Honor, that it is for this Court to merely determine whether or not Mr. Adamson has appropriately invoked the Fifth Amendment based on the fact that he has a fear of being prosecuted for the murder of Don Bolles. Now, my client has answered that question in the positive, that he does have a fear of being prosecuted. He also has indicated that he does not feel the plea agreement is in existence because he has completed and fully fulfilled all the obligations under that plea agreement.

I think, Your Honor, I have filed this letter with the Court under a request for a protective order, and so the letter is already in the Court file that I have received from the Attorney General's office. It obviously is their position under paragraph 3 that a refusal of John Adamson to submit to interviews is a violation of the plea agreement and, as the letter carries on, it talks about not only prosecuting John Adamson for the killing of Donald Bolles, but prosecuting him for many other crimes as well.

I think what is happening here is this Court must simply rule on whether or not my client is properly invoking the (p. 4) Fifth Amendment. We have another forum and another Court who presided over Criminal Cause Number 93385, that is before the Pima County Superior Court, before Judge Ben Birsdall in Pima County. That was a plea agreement that was reviewed by him and

accepted by him at the time that he had that case. The only reason it is transferred back to Maricopa County, as far as my understanding, is because of recordkeeping policies.

Mr. Adamson's plea agreement, again, we believe has been fulfilled. I don't believe he is under an obligation to testify at the trial against either Max Dunlap or James Robison. That may be another matter as to whether or not he refuses to testify. But, again, I believe, Your Honor, it is Judge Birdsall who must preside over the actual question of whether or not that plea agreement has been completed, whether or not the State is in violation of the agreement, whether or not John Adamson is in violation of the agreement; and then the second threshold question must be answered as to if Mr. Adamson is not in violation of the agreement, what happens, and if he is in violation, what is to happen.

Now, that man has been sentenced, and it is our position, Your Honor, that the only thing that this Court must rule on at this time for these questions is whether or not it is appropriate for him to take the Fifth Amendment, and where he has a fear of being prosecuted not only for first degree murder but other cases as well, I think it is appropriate on foundational (p. 5) questions for him to invoke the Fifth Amendment.

For that reason, Your Honor, I am asking the Court to reconsider its ruling directing my client to answer the last question that was in conjunction with the giving to the Court the copy of the plea agreement. The Court: On the matters then that have been presented the Court will reverse its previous ruling requiring the witness to answer the question.

.

[Caption omitted]

MOTION TO COMPEL TESTIMONY OF WITNESS OR IN THE ALTERNATIVE FOR A STAY

COMES NOW, plaintiff, State of Arizona, by and through counsel undersigned, and moves this Court for an Order compelling the witness John Harvey Adamson to answer questions propounded by the parties pursuant to a plea agreement previously entered into between the witness John Harvey Adamson and the State of Arizona, attached hereto as Exhibit A and hereby made a part hereof, and pursuant to Rule 15.3(a)(3).

Alternatively the State requests that the Habeas Corpus hearing, Motion To Set Bail hearing and Motion for Taking Deposition hearing, by all parties, be temporarily suspended so that the State may seek a Petition for Special Action in the Arizona Supreme Court.

DATED this 22nd day of April, 1980.

ROBERT K. CORBIN Attorney General

/s/ Stanley L. Patchell
Assistant Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007

Attorneys for PLAINTIFF

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 15.3 permits the court to require a witness to testify if it is apparent that the testimony is material and

the witness refuses. This is the case with John Harvey Adamson.

Rule 3, Arizona of Procedure for Special Action states the grounds available for seeking a special action. Because of the obvious materiality of the witness' testimony Rule 3(C) would be alleged as grounds for the Action should the court refuse to compel the testimony of the witness Adamson.

Respectfully submitted this 22nd day of April, 1980.

ROBERT K. CORBIN Attorney General

/s/ Stanley L. Patchell
Assistant Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007
Attorneys for PLAINTIFF

(p. 6)

Phoenix, Arizona April 22, 1980 [Excerpt]

PROCEEDINGS

The Court: The record may show that the State of Arizona has filed and submitted to the Court a motion to compel testimony of the witness John Harvey Adamson or in the alternative for a stay. The Court will hear the matter prior to the continuation of the testimony of the witness John Harvey Adamson.

Mr. Patchell.

Mr. Patchell: Thank you, Your Honor. It is the State's position, Your Honor, that the witness John Harvey Adamson, pursuant to the plea agreement entered into previously, is required to answer the questions that have been propounded to him by the defendant Dunlap.

Specifically referring to subparagraph 5 of the plea agreement, it says: "It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials."

This is a hearing within the contemplation of the plea agreement and, therefore, Mr. Adamson should be required (p. 7) by the Court to testify at this hearing. It is at least contempt on the part of Mr. Adamson to refuse to testify at this point if not a complete violation of the plea agreement.

It is Mr. Adamson's contention, pursuant to advice from his counsel, that he is in danger of incriminating himself because he is testifying about matters for which he himself could be prosecuted if in fact the plea agreement still exists. His lawyer on Friday told the Court that he is refusing to answer because he believes that the plea agreement between Adamson and the State has been fulfilled and that there is no compelling reason for him to testify pursuant to the plea agreement anymore.

It is the State's position that that is incorrect. It is the State's position that the Court at this point should construe the agreement, which is attached as an exhibit to the State's motion to compel testimony, and make a ruling and a determination as to whether or not Mr. Adamson must testify pursuant to this plea agreement. The plea agreement is a matter of a few pages long, it is a matter of some 18 paragraphs, all of which can and should be construed by this Court at this time.

In the alternative, the State has asked that the hearings upon which his testimony is to apply, Mr. Adamson's testimony is to apply, for bail, for taking depositions and the habeas corpus hearing, be stayed until the State has an opportunity to have the matter determined by the Arizona Supreme Court (p. 8) pursuant to a petition for special action. That is the State's position at this point, that the agreement must be construed by this Court at this time so that the witness Adamson may know whether or not he is in violation of the plea agreement and whether or not he is compelled to testify pursuant to the plea agreement at this hearing.

In the alternative, we make the request for the stay so we can have that matter determined by the Supreme Court.

The Court: It is ordered that the State's motion to compel testimony of the witness John Harvey Adamson is denied. The Court will rule as to each question as presented to the witness.

It is further ordered that the alternative motion of the State for a stay of these proceedings is denied.

JOHN HARVEY ADAMSON

called as witness herein, having been first duly sworn, testified as follows:

CROSS EXAMINATION

By Mr. Henze:

- Q. Mr. Adamson, are you invoking your privilege not to incriminate yourself under the Fifth Amendment to the United States Constitution and refusing to answer the questions that have been (p. 9) asked of you by now both the State, the attorneys for defendant Dunlap and myself because you are afraid of being prosecuted for anything?
- A. I am taking the Fifth Amendment on advice of counsel.

- Q. When you say in response to my last question you are taking the Fifth Amendment on advice of counsel, are you taking the Fifth Amendment to my last question, or is that an answer as to why you are taking the Fifth Amendment?
 - A. That is an answer.

CROSS EXAMINATION

By Mr. Patchell:

- Q. Mr. Adamson, would your answer be that you are taking the Fifth Amendment to any testimony, whether under oath or not, at all interviews, depositions, hearings and trials?
 - A. Can I have the question read back? I lost it.

(Whereupon, the last question was read by the court reporter.)

The Witness: May I consult with counsel?

The Court: You may.

(WHEREUPON, the witness conferred privately with his counsel.)

The Witness: Under the circumstances, yes.

Q. By Mr. Patchell: I'm sorry?

The Witness: Under the circumstances, yes.

(p. 10) Q. To just add a little to my last question, that phraseology I got from the plea agreement, did you realize that, or from the whatever you want to call it, this document?

A. It sounded like Bill Schafer's words: I didn't know whether he had written it down for you to ask or whether it came out of the plea agreement, but it sounded like Bill Schafer.

Q. I am telling you now that is from the plea agreement.

A. I have to believe you, Stan.

Q. Do you still answer that way?

A. Yes.

Q. In light of that?

A. Yes.

Mr. Patchell: That is all I have.

(p. 11)

Phoenix, Arizona April 24, 1980 [Excerpt]

PROCEEDINGS

Mr. Feldhacker: The State is asking this Court to order him to testify under the plea agreement. I think the State keeps using this plea agreement as a document that they think has some full, force and effect before this Court. I submit that the Court cannot utilize the plea agreement to order Mr. Adamson to testify for the reason that the plea agreement, it is our position, has been fulfilled.

Further, I don't think anyone at this point in time has jurisdiction over that plea agreement and John Harvey Adamson other than merely if he is subpoenaed as a witness in this case. He will respond to a subpoena. He may appear in Court. He may refuse to testify. And he may certainly be held in contempt for a refusal to testify. However, I don't think that anything under the plea agreement can be ruled upon by this Court.

IN THE SUPERIOR COURT Of Maricopa County, State Of Arizona

No. CR-

STATE OF ARIZONA,

Plaintiff,

VS.

JOHN HARVEY ADAMSON,

Defendant.

INFORMATION FOR MURDER

The ARIZONA ATTORNEY GENERAL accuses JOHN HARVEY ADAMSON on this 8th day of May, 1980, of the crime of Murder, a felony, charging that in Maricopa County, Arizona:

JOHN HARVEY ADAMSON, on or about the 2nd day of June, 1976, and before the filing of this Information, murdered Donald F. Bolles in violation of Ariz.Rev. Stat.Ann. §§ 13-451, 13-452 as amended, 13-453 as amended, and 13-454 as amended (presently Ariz.Rev.Stat.Ann. §§ 13-703 as amended, 13-1101, 13-1104, and 13-1105).

ROBERT K. CORBIN Attorney General

/s/ William J. Schafer, III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Caption omitted]

PETITION FOR SPECIAL ACTION

(Filed May 13, 1980)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorneys undersigned, as and for his Petition for Special Action, hereby alleges and states as follows:

I

That the Petitioner was charged by way of a complaint on June 13, 1976 with the killing of Donald F. Bolles in Maricopa County, Arizona in the Northeast Phoenix Justice Court.

II

That the Petitioner was held to answer on this open murder charge, resulting in an Information being returned against the Petitioner in the Superior Court in and for the County of Maricopa, in Case No. CR-93385.

\mathbf{III}

On January 15, 1977 Petitioner entered a plea of guilty to the open murder charge before the Honorable Ben Birdsall, Judge of the Superior Court in and for the County of Pima, in Case No. CR-93385, alleging the killing of Donald F. Bolles, and at that time the charge was designated as murder in the second degree.

IV

Thereafter, the plea agreement was accepted by the Superior Court and, on December 7, 1978, Petitioner John

Harvey Adamson had Judgment of Guilt rendered against him by the Honorable Ben C. Birdsall in CR-93385 and was sentenced at that time to a term of not less than 48 nor more than 49 years at Arizona State Prison to date from June 13, 1976. (Copy of the minute entry of that sentencing attached hereto and fully incorporated by reference herein and designated as Exhibit A)

V

Thereafter, on the 8th day of May, 1980 the office of the Attorney General of the State of Arizona, by and through its Chief Counsel, William J. Schafer III, filed a document entitled "Information for Murder" in CR-93385, and a warrant was issued on the basis of that information by the Honorable William French.

VI

On the 9th day of May, 1980, a motion to quash that warrant and to strike the pleading entitled "Information" was filed by counsel for Petitioner and a hearing was set for May 12, 1980 at the hour of 11:00 o'clock a.m. before the Honorable William French.

VII

On May 12, 1980, oral arguments were heard on Petitioner's request to quash the warrant and to strike the pleading entitled "Information".

VIII

On May 12, 1980, in the afternoon, the Honorable William P. French entered his Order denying Petitioner's

request to quash the warrant and to strike the pleading entitled "Information" from the Court file in CR-93385 and entered an Order granting the State's request for a petition for habeas corpus ad prosecutum and ordering that the defendant be subjected to an initial appearance and arraignment on the Information for Murder as filed by the State on the 8 day of May, 1980.

IX

This Court has jurisdiction of this Special Action pursuant to 17 A.R.S. Rules of Criminal Procedure for Special Actions, Rule 3(b) and (c). The denial of the Petitioner's motion to quash the warrant and to strike the pleading entitled "Information" from the file was arbitrary, capricious and an abuse of discretion.

\mathbf{x}

There has never been a judicial Order setting aside any of the Superior Court Orders in CR-93385 entering a Judgment of Guilt and a sentencing against the Petitioner JOHN HARVEY ADAMSON for the murder of Donald F. Bolles.

XI

Such a judicial Order would be mandatory to allow the State to proceed with the prosecution as it has as alleged herein.

XII

The Superior Court of the State of Arizona, as a result of the entry of the judgment and sentencing on December 7, 1978, is without jurisdiction to hear any further

matters in this case as the defendant's sentence was legally imposed and the defendant is still currently serving his term of 48 to 49 years for the killing of Donald F. Bolles.

XIII

That unless this Court grants the Petitioner's Petition for Special Action, it will create irreparable harm to the Petitioner by exposing him to a Court without jurisdiction and, further, exposing him to double jeopardy in violation of the double jeopardy clauses of the United States and Arizona Constitutions.

XIV

That the Petitioner has no equally plain, speedy and adequate remedy by appeal.

WHEREFORE, the Petitioner respectfully requests:

- 1. That an interlocutory stay order issue out of this Court prohibiting the Maricopa County Superior Court from proceeding with the prosecution in this matter until such time as this Court has ruled on this Petition;
- 2. That an Order issue out of this Court prohibiting the Respondents from subjecting the Petitioner to a second prosecution under these circumstances and that this matter be dismissed with prejudice; and
- 3. For such other and further relief as this Court deems appropriate.

RESPECTFULLY SUBMITTED this 13 day of May, 1980.

MARTIN & FELDHACKER

By: /s/ William H. Feldhacker 5829 N. 7th St., Suite 1-C Phoenix, Arizona 85014 Attorneys for Petitioner

MEMORANDUM

Petitioner, by and through his counsel undersigned, hereby presents this Memorandum, together with the attached pleadings that have been filed in this case before the Respondent Judge, as well as referring to the entire file in Maricopa County Superior Court Case Number CR-93385, which Petitioner fully incorporates into this Memorandum by reference thereto, in support of his instant Petition for Special Action.

The Petitioner herein reiterates all of the allegations made in his Petition for Special Action and hereby argues further as follows:

That Petitioner attaches hereto copies of the minute entry designating the entry of judgment of guilt and sentencing of the defendant JOHN HARVEY ADAMSON, in CR-93385 before the Honorable Ben C. Birdsall, Judge of the Superior Court in and for the County of Pima. Further, the Petitioner attaches hereto as Exhibits B, C and D the Information filed by the Office of the Attorney General dated May 8, 1980 as well as the warrant issued thereon, and as Exhibit D attached hereto a copy of the State's request for a writ of habeas corpus ad prosecutum.

As stated in the Petition for Special Action allegations, on May 12, 1980, the Respondent Judge issued an Order that the petitioner may be prosecuted before the Maricopa County Superior Court in CR-93385 for the crime of murder. Clearly, by referring to the Court file in CR-93385, this Court can see that the Petitioner, JOHN HARVEY ADAMSON has been adjudged guilty and sentenced to prison for the killing of Donald F. Bolles. This judgment of guilt was for the crime of murder in the second degree. There never was any necessity for an amendment of the original charging document as it charged murder open in 1976. The office of the Attorney General on the day of the defendant's entry of his plea, designated the murder open charge as murder in the second degree.

Since that time, there has never been any Order setting aside the judgment of guilt and sentencing by the Honorable Ben C. Birdsall. Further, the defendant is currently serving his time for the killing of Donald F. Bolles, and presently is in the custody of the United States Marshal's office. The defendant's custody with the United States Marshal's office is pursuant to a separate and distinct agreement with the United States Attorney's office resulting in the defendant's cooperation with the United States Attorney's office in the prosecution of Neil Roberts and James Robison for the attempted bombing of the Indian Health Services Building in Phoenix, Arizona.

The Petitioner submits that by the filing of the document entitled "Information" on May 8, 1980 that the State is attempting to prosecute the defendant in violation of A.R.S. § 13-111, Art. II, Section 10 of the Constitution of the State of Arizona, and Article I, Section 9 of the United States Constitution, Amendment 5.

As alleged in the Petitioner's Petition for Special Action, the Petitioner filed a Motion to Quash the Warrant filed in CR-93385 and to strike the "Information for Murder" that was filed on May 8, 1980. As to Petitioner's position on the filing of those documents and his objection thereto, Petitioner attaches as Exhibit E to this file a copy of the Petitioner's Motion to Quash the Warrant and to Strike the Information from the Court's file. The Petitioner fully incorporates his arguments contained therein into this Memorandum.

In denying the Petitioner's Motion to Quash the Warrant and to Strike the Pleadings, the Court, in its Order, relied on the cases of State vs. Rice, 99 Ariz. 14, 405 P.2d 894 (1965) and State vs. Johnson, 97 Ariz. 27, 398 P.2d 392 (1964). The Honorable William P. French relied on those two citations of authority for the proposition that the State could proceed in the manner in which they have in filing the new document entitled "Information".

It is respectfully submitted to this Court that those cases are not only inder the old rules of criminal procedure in the State of Arizona; however, are totally inappropriate to the situation before the Court at this time. In the Rice case, supra, a defendant requested of the Court to withdraw his plea to the charge of manslaughter. The Court granted the defendant's request and allowed a new charge of murder, which was originally filed to proceed in its place. It is submitted to the Court that that case is entirely different than the one before this Court as it was the defendant who took action to withdraw his plea. Further, that case is very distinct from the one presently before this Court as the matter of the validity

or the invalidity of the defendant's plea had already been ruled upon by a judicial order. The case of State of Arizona v. Johnson, supra, is similar in nature in that a Court had already ruled as to the validity of the actions of the State before allowing it to proceed.

In this case, the Attorney General's office, by and through its assistant, William Schafer, has argued to the Superior Court that it is entirely up to the office of the Attorney General to determine whether or not JOHN HARVEY ADAMSON has breached his plea agreement and, if in their opinion, he has breached his agreement, they may proceed to prosecute. Apparently, Judge French has agreed with their position and has allowed them to proceed with a prosecution of JOHN-HARVEY ADAM-SON. There is no doubt that this is an arbitrary and capricious ruling by Judge French and allows the Maricopa County Superior Court to simply become an arm of the prosecution and let them do what they please with a defendant regardless of whether or not the Court inquires as to its jurisdiction to hear the matters before it. It is inconceivable that a Court would not advise a prosecutor that they must first obtain a competent legal ruling as to whether or not JOHN HARVEY ADAMSON is in violation of his plea agreement prior to proceeding with the prosecution of him.

It is this relief that the Petitioner is requesting by asking that this Court dismiss the proceedings below in the stage that they are in at this time and to order the Court below to take no further action in this matter until such time as the office of the Attorney General appropriately raises the issues as to whether or not they can

proceed with the prosecution of JOHN HARVEY ADAM-SON under the circumstances of this case at this time.

It is the Petitioner's position that, especially at this time, allowing the State to proceed would be in violation of a prohibition against double jeopardy. The defendant has entered a guilty plea to the crime with which he is now charged and has been sentenced on that crime. There is no doubt that at the time defendant was sentenced, jeopardy attached. See Lombrano v. Superior Court, 606 P.2d 15 (Ariz. 1980).

The defendant has already cited the United States and Arizona Constitutions for their prohibition against multiple prosecutions for the same offense and herein reiterates Article II, Section 10 of the Arizona State Constitution which establishes that:

"No person shall be twice put in jeopardy for the same offense."

It is clear that State Courts have held that a defendant cannot be tried for the same offense having once been placed in jeopardy. State v. Burruell, 98 Ariz. 37, 401 P.2d 733 (1965).

The defendant herein argues no further on the issues of jurisdiction and double jeopardy as the defendant at this time is merely requesting an Order of this Court addressing itself to the appropriateness of the action before the Honorable William French on the 12th day of May, 1980. It is respectfully submitted that if, at such time, the State appropriately raises the issue of the validity of the defendant's plea agreement, that that matter will be addressed in a full and complete hearing at the appropriate time. However, if the State never wishes to

address itself in requesting a Court to rule on the validity of the defendant's plea agreement, it is submitted that it may find itself in a position of total inability to proceed with any prosecution against JOHN HARVEY ADAMSON.

RESPECTFULLY SUBMITTED this 13 day of May, 1980.

MARTIN & FELDHACKER

43

By: /s/ William H. Feldhacker 5829 N. 7th St., Suite 1-C Phoenix, Arizona 85014 Attoneys for Petitioner IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Caption omitted]

RESPONSE TO PETITION FOR SPECIAL ACTION

(Filed May 16, 1980)

For their response respondents:

I

Admit the allegations of paragraph I in the petition.

II

Admit the allegations of paragraph II in the petition.

 \mathbf{III}

Admit the allegations of paragraph III in the petition.

IV

Admit the allegations of paragraph IV in the petition.

 \mathbf{v}

Admit the allegations of paragraph V in the petition.

VI

Admit the allegations of paragraph VI in the petition.

VII

Admit the allegations of paragraph VII in the petition.

VIII

Admit the allegations of paragraph VIII in the petition.

IX

Admit the allegations of paragraph IX in the petition.

X

Admit the allegations of paragraph X in the petition.

XI

Deny the allegations of paragraph XI in the petition.

XII

Deny the allegations of paragraph XII in the petition.

XIII

Deny the allegation of paragraph XIII in the petition.

XIV

Admit the allegations of paragraph XIV in the petition. As affirmative defenses respondents allege that:

I

Petitioner breached his agreement with the state referred to in paragraphs III and IV of the petition.

II

Petitioner's breach of the agreement automatically rendered the agreement null and void, put both parties back into the position they were in before they entered into the agreement and automatically reinstated the original open murder charge.

Ш

The filing of the Information referred to in paragraph V of the petition was a proper method to bring petitioner before the trial court and start proceedings on the original charge.

IV

By its voluntary agreement and the breach thereof, petitioner has waived any claim to jeopardy on the reinstatement of the original charge.

Wherefore, respondent denies that petitioner is entitled to a stay or a prohibition of the current proceedings against him in the Maricopa County Superior Court.

Respectfully submitted this 16th day of May, 1980.

Respectfully submitted,

ROBERT K. CORBIN Attorney General

By: /s/ William J. Schafer III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007
Attorneys for RESPONDENTS

RESPONDENTS' MEMORANDUM

In this Court petitioner argues the same things he argued below to Judge French. He maintains that the

state had no authority to file the May 8, 1980, Information for open murder, that the judge had no authority to issue a warrant, that the Information should only be filed with Judge Birdsall in Pima County, and that Mr. Adamson could not now be tried for murder because he is already serving a sentence for second degree murder involving the same incident.

In 1976 an information was filed in this case, Maricopa County Superior Court case No. CR-93385. It charged Mr. Adamson with murdering Don Bolles. In January, 1977, Mr. Adamson entered into an agreement with the state to testify against a number of other people for a variety of crimes in exchange for a plea to an amended charge of murder in the second degree. He agreed that he would testify fully whenever called upon by the state at a trial, a hearing or a deposition. He agreed that if he did not testify when called upon, the original murder charge would be automatically reinstated and that he would thereafter go to trial on that charge. He also agreed that if he did not testify he and the state would be returned to the position each was in before the agreement. Mr. Adamson agreed to all of this in writing by signing the plea agreement, then orally when he pleaded to the amended charge. At his change of plea the court noted specifically:

Paragraph 15, in the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement. I understand that to mean, sir, that you would be facing the charge of open murder as you were when you first came into this court.

(R.T. of Plea, Jan. 15, 1977, at 19.) Mr. Adamson's answer to this was, "Yes, sir." Thus, when Mr. Adamson

breached the agreement he was put back in the position he was in before he entered into the agreement—facing an information in Maricopa County case No. CR-93385 charging him with open murder.

With the breach, the open murder charge was automatically reinstated. Nothing had to be done by a court or the defense. The only thing needed was an act of reinstatement by the state. This situation is not new in Arizona. This Court has faced similar situations twice: State v. Rice. 99 Ariz. 14, 405 P.2d 894 (1965); State v. Johnson, 97 Ariz. 27, 398 P.2d 392 (1964). In both cases original informations had been amended, in Rice by a plea, in Johnson by the state. In both cases the question was how to revive the original information, or at least its contents. Each trial court "reinstated" the original information and ordered trial to proceed. This Court upheld both convictions but chided each trial court for "reinstating" the original information. What took place legally, said this Court, was an amendment of the charges pleaded to, to conform to the original charges. This is all the information filed against John Adamson on May 4 [sic] did.

Filing a second information in the same action where the first may have lost its vitality is not new in Arizona. When motions to quash existed, a second information was specified as one of the remedies when a motion was granted. See State v. Freeman, 78 Ariz. 281, 279 P.2d 438 (1955). Although motions to quash do not remain, the remedy does. See States v. Sims, 114 Ariz. 292, 560 P.2d 810 (Apr. 1977); State v. Fuentes, 12 Ariz.App. 48, 467 P.2d 760 (1977).

There was no reason to file the information with Judge Birdsall in Pima. Filing is a ministerial act. An information is filed with the clerk's office, not a judge. The only proper place to file a document in Maricopa County case No. CR-93385 is with the clerk's office in Maricopa County. That file is with the Maricopa County Clerk. It has retained its Maricopa number throughout; and, as the minute entry of December 15, 1976, shows, defense counsel insisted upon that. Judge Birdsall and Pima County came in contact with the case only after a motion for "change of the place of trial" was granted under Rule 10.3. And that was the only reason the case went to Pima-for a change of the place of trial because of the publicity that surrounded the case in 1976. It is now four years later. The reason for sending the case to Pima no longer exists.

Petitioner argues that a warrant may be issued only upon the issuance of an indictment or a finding of probable cause by a magistrate. But that isn't true. As the comment to subsection "c" of Rule 3.1 shows, a court has inherent power to issue warrants for any number of reasons. See Ariz.Rev.Stat.Ann. §§ 12-122, 12-123 as amended. And courts properly do it all the time-for defendants who fail to show or wander off, for witnesses, and even third parties. Rule 3. is not meant to narrow the court's inherent powers; a warrant is simply a way of getting a person before the court. But because Mr. Adamson is in federal custody this may be academic. A proper way to bring Mr. Adamson out of federal custody and before this Court is by a writ of habeas corpus ad prosequendum. This is what is required by 18 U.S.C.A. § 4085 and case authority. Trigg v. Mosely, 433 F.2d 364 (10th

Cir. 1970); State v. White, 39 Okl.Cr. 242, 264 Pac. 647 (1928); see State v. Heisler, 95 Ariz. 353, 390 P.2d 846 (1964). Judge French properly issued a writ of habeas corpus ad prosequendum. The writ was executed and petitioner appeared for arraignment before a court commissioner on May 12. Counsel was appointed for him, he was ordered held without bond and a trial date of July 3, 1980 was set. When petitioner voluntarily entered into his plea agreement he knew that if he breached the agreement the sentence he was serving (because it began to run from the day he was arrested) was null and void and he would be prosecuted for murder and could receive a death sentence.

Attached to this response is a copy of petitioner's plea agreement, and a copy of his sentencing where he and his lawyers acknowledged that he would return for further testimony. Also attached is a copy of his lawyers' letter of April 3, 1980, announcing that petitioner would no longer testify, a copy of the state's reply to that letter, a copy of the state's motion to compel petitioner's testimony and copies of transcript references of petitioner's refusal to testify.

The question of whether petitioner is obligated to testify under his agreement is important to the continued prosecution of those responsible for the murder of Don Bolles. Respondents urge this Court to take jurisdiction of this special action and decide the issue.

Respectfully submitted,
ROBERT K. CORBIN
Attorney General
By: /s/ William J. Schafer, III
Chief Counsel
Criminal Division
Attorneys for PLAINTIFF

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Caption omitted]

PETITIONER'S MOTION FOR DISMISSAL OF PETITIONER'S PETITION FOR SPECIAL ACTION

(Filed May 16, 1980)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney, WILLIAM H. FELDHACKER, hereby moves this Court for an Order dismissing the Petition for Special Action filed in this matter on the 13th day of May, 1980 in behalf of JOHN HARVEY ADAMSON. Currently, this Court has set an informal hearing for the 28th day of May, 1980 at 10:00 a.m. Petitioner requests that that hearing be vacated and that the Petition be dismissed for the following reasons:

At the time that the Petition for Special Action was filed in behalf of the Petitioner, this Court, by and through the Honorable Justice Jack D. H. Hays denied Petitioner's request for stay of the proceedings below.

Thereafter, the Petition was filed by the Petitioner's counsel and a hearing date set for May 28, 1980 at 10:00 a.m. before the Supreme Court.

Due to the denial of the request for a stay of the proceedings below, Petitioner was subjected to an initial appearance on an open murder charge in the Court below as well as being subjected to an arraignment in the Maricopa County Superior Court with a trial date set of July 3, 1980 before the Honorable Sarah D. Grant, Judge of the Maricopa County Superior Court.

Based upon the argument before the Honorable William P. French, Chief Criminal Presiding Judge of the Maricopa County Superior Court, leading to this Petition for Special Action, and the arguments and record made before the Commissioner at the time of the Petitioner's initial appearance and arraignment, it is the Petitioner's position that an adequate record has been made below to establish his position of double jeopardy and that the Petitioner may now proceed through the normal channels of appeal should he continue to be prosecuted on the open murder charge that the State currently feels is pending against him.

For all of these reasons, it is respectfully requested that this Court enter an Order dismissing Petitioner's Petition for Special Action and vacating the hearing date of May 28, 1980 before this Court.

RESPECTFULLY SUBMITTED this 16th day of May, 1980.

MARTIN & FELDHACKER

By: /s/ William H. Feldhacker 5829 N. 7th St., Suite 1-C Phoenix, Arizona 85014

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Caption omitted]

OPPOSITION TO PETITIONER'S MOTION FOR DISMISSAL OF PETITIONER'S PETITION FOR SPECIAL ACTION

(Filed May 16, 1980)

Respondents oppose petitioner's motion to dismiss his own special action for the reasons set forth in the accompanying memorandum.

ROBERT K. CORBIN Attorney General

By: /s/ William J. Schafer III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007
Attorneys for RESPONDENTS

MEMORANDUM

The issues in the special action are joined. Respondents filed their response to the petition for special action and served petitioner by mail today, Friday, May 16, 1980. The issue presented to the Court is of great importance to the entire criminal justice system in the State of Arizona. It concerns one of the most important criminal prosecutions in this state's history. Until today petitioner has insisted that a court determine the issue continuous contents.

cerning his plea bargain and his testimony against Max Dunlap in the forthcoming murder trial in Maricopa County Superior Court. Petitioner posited the issue to the Court on Tuesday, May 13, when he filed his special action. The state responded agreeing that the issue was before the Court and arguing that jurisdiction should be taken by this Court. With the issue before this Court and a hearing set for May 28, the state moved for a continuance of the Dunlap trial date of May 21, to allow this Court to decide the issue and avoid the necessity of the state moving to dismiss the charge against Dunlap. The state's motion to continue was denied late yesterday afternoon. With that the state was once again faced with the alternative of renegotiating with Mr. Adamson or dismissing the charge against Mr. Dunlap because Mr. Adamson refused to testify. And it was only after Judge Myers denied the state's motion for a trial continuance that Mr. Adamson moved to dismiss his special action which would have resolved the issues. Adamson's position has not changed since he filed his petition on Tuesday. The only things that took place are an initial appearance and an arraignment.

This Court should not countenance any more such strategic maneuvers. Because the issues are joined and petitioner has been served with the response, the action is not his to dismiss; it is now discretionary with this court. Rule 41(a), Rules of Civil Procedure.

The motion to dismiss should be denied.

Respectfully submitted this 16th day of May, 1980.

ROBERT K. CORBIN Attorney General

By: /s/ William J. Schafer III
Chief Counsel
Criminal Division
State Capitol Building
West Wing—Second Floor
Phoenix, Arizona 85007
Attorneys for RESPONDENTS

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Caption omitted]

REPLY TO RESPONDENTS' OPPOSITION TO MOTION FOR DISMISSAL OF PETITION FOR SPECIAL ACTION

(Filed May 19, 1980)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney undesigned, hereby replies to Respondents' Opposition to Motion for Dismissal of Petition for Special Action.

Initially, Respondents contend that the issues raised in Petitioner's Petition for Special Action are now joined and that pursuant to 16 A.R.S., Rules of Civil Procedure, Rule 41(a), a dismissal of the petition is discretionary with the Court. Petitioner informed William J. Schafer III, Assistant Attorney General, on Thursday, May 15, 1980 that Petitioner was contemplating dismissing his Petition for Special Action in the above-captioned matter. This was an oral indication made by counsel for Petitioner to Mr. Schafer and said communication was delivered prior to Judge Myers' ruling regarding the State's motion to continue the trials of Max Dunlap and James Robison.

The following morning, that is May 16, 1980, Petitioner filed a pleading captioned "Petitioner's Motion for Dismissal of Petitioner's Petition for Special Action". This pleading was filed at approximately 11:30 a.m. Counsel undersigned is informed that subsequent to that time on that date the State of Arizona, through Mr.

Schafer, filed its Response to the Petition for Special Action and served Petitioner by mail.

At the time of the dictation of this reply, Petitioner has not received Respondents' Response. Therefore, Petitioner requests that this Court treat his motion to dismiss the Petition for Special Action as in fact a Notice of Dismissal filed before service by the Respondents of their response on the Petitioner, and that this matter be dismissed pursuant to 16 A.R.S., Rules of Civil Procedure, Rule 41(a).

In light of some of the allegations made by the Respondents in their opposition to Petitioner's Motion for Dismissal, Petitioner feels constrained to respond to these allegations for the record. Respondents contend that until the filing of his Mótion to Dismiss the Special Action Petition, Petitioner "has insisted that a Court determine the issue concerning his plea bargain and his testimony against Max Dunlap in the forthcoming murder trial in the Maricopa County Superior Court". To the contrary, Petitioner has maintained throughout the last two months that, in fact, he has discharged all of his obligations taken on pursuant to his plea agreement with the State of Arizona in Maricopa County Criminal Cause No. 93385. At no time has Petitioner ever requested any Court to determine any issue concerning his plea agreement in that matter. Further, Respondents argue that by the filing of his Petition for Special Action, Petitioner has posited the issue regarding his plea agreement to this Court. A reading of Petitioner's Petition for Special Action will reveal that the question of the Petitioner's compliance with the provisions of his plea agreement has not been raised by the allegations in his petition and that, in fact, Mr. William H. Feldhacker, counsel for Petitioner, on Tuesday, May 13, 1980, specifically informed the Honorable Jack D. H. Hays that Petitioner was not raising that issue in his Petition.

The Respondents further contend that the issue as they see it presented to the Court by Petitioner's Petition for Special Action is of great importance to the entire criminal justice system in the State of Arizona and concerns one of the most important criminal prosecutions in this State's history. In that regard, notwithstanding the notoriety of this case, Petitioner is nevertheless entitled, through his counsel, to defend against the allegations leveled against him by any manner within the bounds of the law. If it is Petitioner's desire to dismiss his Petition for Special Action and he has followed the requirements as set forth by the rules, those rules should not be ignored and disregarded because of the nature of the case. By the filing of Petitioner's Motion for Dismissal of Petitioner's Petition for Special Action, as supplemented by this Reply to Respondents' Opposition thereto, it is Petitioner's intention to voluntarily dismiss his Petition for Special Action in the above-captioned matter.

DATED this 19 day of May, 1980.

MARTIN & FELDHACKER

By: /s/ Gregory H. Martin 5829 N. 7th St., Suite 1-C Phoenix, Arizona 85014

(p. 2) IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Caption omitted]

Phoenix, Arizona May 28, 1980

Justice Struckmeyer: Cause 14898, John Harvey Adamson against the Superior Court of Maricopa County. Fine. Thank you, Gentlemen.

Mr. Feldhacker: If it please the Court, my name is Bill Feldhacker. I represent the petitioner in the Petition for Special Action, along with my partner, Greg Martin.

We have brought a petition before this Court basically because Judge French is now allowing the prosecutor to proceed with the prosecution of John Harvey Adamson when there's a valid judgment appealed from the sentencing in the file in case number CR 93385.

I argued before Judge French that it was inappropriate for him to allow the State to proceed with the prosecution when there is a valid judgment of guilt and sentencing on file. That apparently was simply overlooked or ignored by Judge French. I have attached a copy of that to my pleadings that I filed before this Court.

(p. 3) Now, after the pleading was filed with this Court, I filed later a motion to dismiss the Petition for Special Action. The reason I filed that is because prior to receiving a response from the State, I had a conversation with Mr. Schafer from the Attorney General's Office, and I received an indication at that time that Mr.

Schafer felt that there were more issues that he was going to raise before this Court than what my intention was to raise.

He felt that issues of whether or not John Harvey Adamson had violated the plea agreement and whether or not he can be forced to testify were before this Court. I advised him that was not my intent, that was not in my petition, and that's not what I'm addressing before this Court today.

The sole issue that I am addressing before this Court is that fact that the Attorney General's Office is proceeding without any authority. They have taken it upon themselves to tell Judge French that a certain man can be prosecuted for a crime for which he is now serving a sentence of forty-eight to forty-nine years. He was sentenced by Judge Birdsall.

I submit to the Court that you will find nothing anywhere in the pleading or the file to indicate that there is anything incorrect or inappropriate about the sentence that my client is now serving.

So based upon those facts, Your Honor, I think (p. 4) there is no doubt that my client is now being subjected to double jeopardy, and I ask the Court to cease the action that's presently pending in Maricopa County Superior Court under 93385.

Justice Holohan: I take it in the arguments—the matters presented to Judge French, that the principle contention was that the petitioner has violated his plea agreement.

Mr. Feldhacker: The contention by the State, Your Honor. That was the contention by the State.

Justice Holohan: Apparently Judge French agreed, denied your motion, and allowed the prosecution to continue.

Mr. Feldhacker: The record would not show that, Your Honor. The record would actually, in fact, show at the close of arguments Judge French, on the record, made a comment that he feels as though at some point in time there is going to have to be some court order as to whether or not the judgment and sentence in the file can be set aside.

My response to that is that it's almost—you know that you are dealing with a contract situation. What is happening is Judge French is giving the State their remedy and then saying, Now, go to court and see what's right or wrong. That's inappropriate, and I don't think that's the process that any of us want to see happen.

The process that is applicable here is for the (p. 5) State to seek any appropriate remedy they think may exist and then, if they are dissatisfied with the results, come back before this Court. And again, the only issue I'm raising is that my client is now being subjected to double jeopardy and further prosecution, interestingly enough in the same case number; and there's no doubt that he is serving time for the killing of Don Bolles, and he is now being prosecuted by the State for the killing of Don Bolles.

Justice Holohan: It's your contention, then, that the provisions of the plea agreement which say that—in effect that if there's a violation, the State may reinstitute the charges, ask for the death penalty, et cetera—

Mr. Feldhacker: Now, I wouldn't argue what the plea agreement says; and specifically in response to that question, Your Honor, I would say any contract, including plea agreements, must in necessity have something in them that calls for an end—a conclusion of the agreement; and if you want to refer to the plea agreement, I would refer this Court to section eight of that plea agreement.

The section eight provides that all parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and exhibits A and B which accompany it.

Just in the early part of December of 1978 my (p. 6) office received a phone call from Mr. Schafer: Let's go to Tucson and sentence John Adamson. There was surprise on my part; however, why should I delay the sentencing? I had no reason to. Mr. Schafer wants my client sentenced. That was my prerogative, because I felt—if you will read this contract, or the plea agreement, you will find when this agreement is to come to an end, and I believe that it came to an end at the time my client was sentenced, pursuant to the provisions of the agreement.

Justice Holohan: Then you feel there is no question for your client to testify on the first case?

Mr. Feldhacker: Your Honor, he testified in the first case as prior to being sentenced, and I think we're at a point in time where the prosecution really needs to be told that if you have an agreement with the defendant and you wish to enforce that agreement and you have a provision such as paragraph eight of our plea agreement, that you do not allow the defendant to be sentenced

and then later expect him to comply with whatever may be in that agreement, because the sentencing is the conclusion of the agreement.

Justice Hays: Counsel, do you give any weight to that portion of the sentencing where I think Mr. Schafer indicated, Now we have it clear for the final acceptance of this plea. We have it clear that Mr. Adamson testified some more—or something to that effect, and nobody seemed to (p. 7) object to that position. I make this response. Was that understood? Does that have any weight, or does it mean—

Mr. Feldhacker: As to the meaning of that, Your Honor—I think that was on December 7, 1978—I believe I have in my notes—I have that there was a discussion of that. I don't think it's as clear as Your Honor has stated, but it's clear that it's understood that it happened.

What happened was that we were asked if there was any legal cause for Mr. Adamson not to be sentenced. We certainly stated there was none. Mr. Schafer said, Yes, I would like to add one thing. I wish the record would show that it has been discussed with Counsel, and I believe Counsel has discussed it with Mr. Adamson, that it may be necessary in the future to bring Mr. Adamson back after sentencing for further evidence. The record may show that; and I stated. That's our understanding.

Subsequently there was one case left from exhibits A and B that were appended to that plea agreement, and that case left was State of Arizona versus Ashford. It's a case that was under investigation. It's basically—I would submit from my conversation with Mr. Schafer—a case that they concluded they would never be able to

actually put together and prosecute. However, Mr. Schafer discussed it with us—about the Ashford case; about the fact that, you know, we had that in the agreement; that, if necessary, he (p. 8) may have to testify in that case.

There's a lot of explanation and a lot of things that go beyond the mere statements here, and I submit to this Court that the record is legally inadequate for this Court to make any rulings as to whether or not John Adamson was in violation of any agreement, because there is no record as to what happened, what things mean, any testimony, anything at all before this Court other than what I have raised in my petition.

Justice Holohan: If you are correct, Counsel, that double jeopardy applies, then there can be no claim of the Fifth Amendment. The defendant—or the former defendant must testify—

Mr. Feldhacker: Your Honor-

Justice Holohan:—like any good citizen.

Mr. Feldhacker: That's correct. Now, if we look at it that way, then you may say that my client should not have taken the Fifth Amendment when he was called to testify in the bond hearing for Max Dunlap, which is what the State is saying is the—

Justice Holohan: I'm not concerned about that, since the plea agreement here is the matter in question. If you are wrong, why he needed all the protection the Fifth Amendment gives.

Mr. Feldhacker: Well, I believe anyone, including-

(p. 9) Justice Holohan: No. That's not my question. The point is, now it's your position that if this is applied and that's the end of the matter, then he has no right to the Fifth Amendment from here on in as a witness. I believe he's asked immunity in all these matters that have been delved into.

Mr. Feldhacker: I think with the Court's addition at the end as to matters that Mr. Adamson has been given immunity for, you are correct. Then he would not be taking the Fifth Amendment. However, he's been placed on notice—and that's in the file—that he was subject to being prosecuted, not only for the killing of Don Bolles, but for any other crimes that they may find that he had previously been given immunity for.

I think, under those circumstances, any man will follow the advice of Counsel and invoke the Fifth Amendment.

Justice Struckmeyer: Mr. Schafer?

Mr. Schafer: If it please the Court, I am William Schafer, Assistant Attorney General, and I represent the respondent here.

I am here this morning to ask this Court to take jurisdiction of this case and to decide one issue, and that is the issue from which all of the other issues flow. That is the plea agreement obligating Mr. Adamson to testify against Dunlap and Robison. If it does, then he's breached it, for he has refused to testify.

(p. 10) It does not take a hearing. It does not take witnesses to determine that he breached the agreement. His lawyer said he was gong to do that in a letter which

I have attached to our response here, and that is exactly what he did. He refused to testify.

It's like the breach in the well-know Santobello case. That was the sentinel [sic] case on plea agreements from the U.S. Supreme Court. The breach was clearly ascertainable; and, as in that case, there is no need for a hearing to determine that. There was no hearing in the Santobello case. The record that existed before the Supreme Court showed that they determined that there was a breach from that record as it existed in its preliminary and procedural steps through the court without a hearing to determine the breach.

There is only one issue here behind every point that was raised below. Behind every point that has been raised in the pleadings and the argument here is that one question. Does the agreement require him to testify?

The double jeopardy argument, the argument concerning our authority or right to reinstate the original charges, and the argument concerning—once that is done—our authority or our right to arraign him and start the orderly process, all of those things depend upon whether Mr. Adamson was obligated to testify under the agreement. If he was, he has refused; and all of his arguments are really for (p. 11) nothing, because he waived those arguments when he signed the plea agreement. Now—

Justice Gordon: At that point which, as I understand it, you have noticed that for almost a month he's taken that position, when in fact the outstanding judgment and sentence is sitting there in his file, and has been there, in which he has been serving time in prison. Do you take the position that he knows the terms of the plea agreement? That that just disappears in the matter of law without any intervention by a judge? Or what does it do? Do you take the position that the Attorney General can treat that judgment and sentence as though it does not exist, especially without a hearing?

Mr. Schafer: Your Honor, I would separate two things. First of all, the question which you raise concerns the judgment that, as Mr. Feldhacker said, was actually sitting in the case. That is probably separate from the authority and the right and the ability of the Attorney General to reinstitute the original charges.

Now, if we reinstitute the original charges, our argument is that that is justified by the plea agreement. I believe it is also justified by case authorities that I've cited to this Court, and I've cited below.

The question is, how do you do that? It makes no difference in that regard that there is a judgment sitting in (p. 12) this case. That judgment will fall once a determination is made that Mr. Adamson had breached the agreement, and it will fall just as though his arguments will fall that he has made concerning the agreement itself.

If this Court is to determine that he has breached that agreement, then it must also determine, according to the terms of the agreement, that the original charges can be reinstated. Either directly or indirectly that would cause that judgment to fall, because Mr. Adamson has agreed—again assuming that you determine that the plea agreement is what it says it is and he has breached it—he has agreed that I can be retried on those original charges, over and above any sentence that I am serving.

So the answer to that question is—our position is yes, that judgment—that sentence—would fall either directly or indirectly, however a court may handle that; but certainly if a court were to say—this Court or any other court—that that plea agreement is in fact—he did breach it, he is chargeable, and he is prosecutable on those original charges, and that is all the court chooses to say, it would obviously by implication mean that that judgment is no longer valid.

Justice Gordon: Well, Counsel, wouldn't it have been better if, after our ruling refusing to interfere with Judge Meyer's determination that Mr. Adamson retained the Fifth, if (p. 13) you had gone to Judge Birdsall's office and entered a judgment for sentence and filed a petition saying, it is the State's position at this point that Adamson has violated-Mr. Adamson has violated his plea agreement, and we would like to set a hearing right away to determine judicially that he has, in fact, violated that agreement, and to get an order from this Court to this very judge who had previously signed the judgment and sentence, setting the plea agreement—or setting that judgment and sentence aside, and proceeding directly to a hearing and setting the matter for trial? Isn't that the 'normal, logical way to proceed, rather than just saying, Well, don't worry about that, Judge; we'll go along, and if we somehow get this man convicted on a new information, the previous judgment and sentence somehow disappears without further order of the Court?

Mr. Schafer: Well, I would say a couple of things in answer to that. I can't say whether or not it's normal, because I have not run into a case similar to this, either in my experience or in cases and case books that I've searched for. I searched diligently in an effort to find out what one would do in a situation like this, to reinstate the original charges.

Now, in reference to whether we should go back to Judge Birdsall, no, I don't think we should go back to Judge Birdsall, and I believe that there would have been an (p. 14) argument that you had no place in going to poor Judge Birdsall. This is the third time, I believe, that this case—the Don Bolles murder case—has been before this court. The second time was in relation to a motion for change of place of trial. The only reason we were before Judge Birdsall is because this Court ordered that the place of trial should be changed. It was changed to Tucson. That's all that was sent to Judge Birdsall's court, the change of the place of trial. That has taken place. That is done. That is over with.

The file sits in Maricopa County. Now, if we're to file anything, it seems logical that we should go before Maricopa County. If the presiding judge, or whoever, were to determine this better go back to Judge Birdsall, then so be it. But we shouldn't start there.

Justice Gordon: Now before whom would post-conviction relief be filed?

Mr. Schafer: If you are talking about a Rule 32, I would assume that would be Judge Birdsall. That was the second point I was going to get to, for getting the choice of judges to go before. What you proposed in your question is us going before a judge to ask the judge if this plea agreement is in effect or was in effect, and was there a breach of it; but that's not what the agreement says.

The agreement says that the charges are automatically reinstated, much the same as our Rules of General (p. 15) Procedure provide for a withdrawal of a plea of guilty. We don't have that, unfortunately, so the plea agreement does not provide for that at all, and all of the parties agreed to automatically reinstate it.

Now, the question is obviously—when I came to research this—"automatically" is fine and good, and everybody knows what that means, but how do we put that across to a judge? We just can't simply file papers saying, automatically reinstate these. Something has to be filed to signify the automatic reinstatement.

The method I chose was based on two cases from this Court for reinstatement of original charges. So the question you propose is different than what is in the plea agreement. The plea agreement nowhere says that we have to go back to a judge, ask him to look at the plea agreement, and then make a determination on a breach, because that is not what we all agreed to from the very beginning.

Now, we are not opposed to—and it's been argued by Mr. Feldhacker before—a court making his determination of a breach. As a matter of fact, when he referred to the argument before Judge French, at the end of the arguments, as I recall, he essentially—if my recall is essentially correct—Judge French said in answer to—I think it was Mr. Martin's argument—that sooner or later some judge is going to have to make a determination as to the (p. 16) plea agreement and whether it's been breached.

Mr. Martin—as I recall, Mr. Feldhacker wasn't there—said that's true. That's their position.

I said the same thing. Yes. Certainly that's going to have to be made sooner or later. We are—we know—both sides know that a motion is gong to be made. Something is going to get the poor judge so that the judge can determine if what we did is correct and if there was actually a breach.

Now, the further argument was made that perhaps that should be made at Judge French's level. Perhaps it was made by Judge French. There is nothing that Mr. Feldhacker says that indicates in his order that he made that determination. Our argument before this Court this morning is that that almost had to be made by Judge French to allow everything to go forward, because everything stems from that one issue.

Justice Hays: Counsel, may I interrupt with something that was raised by Mr. Feldhacker. That's provision eight in the plea agreement. It says all parties to this agreement hereby waive the time for sentencing and agree the defendant will be sentenced at the conclusion of his testimony in all of the cases—and then was sentenced. Would you address that, please?

Mr. Schafer: Well, the first point I raise there, Your Honor, is one that I raised before, and revolves around (p. 17) page 37 of the sentencing itself; and Mr. Feldhacker quoted part of it, but only part of it. What he quoted would not mislead the Court, but I think I should call all of it to the Court, because I think it shows that it was everybody's belief and understanding that that was

not the end of the plea agreement; and this is what happens on page 37 before Judge Birdsall.

First of all he says-this is the Court, all right?

"The Court: Sentencing is limited by the terms of the plea agreement which was entered into in this case." Dot, dot, dot. The rest of it is immaterial at this point. Here. "Do you have anything, Mr. Schafer?

"Mr. Schafer: Yes. I would like to add one thing. I wish the record would show that it has been discussed with Counsel, and I believe Counsel has discussed it with Mr. Adamson, it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.

"The Court: The record may show that.

'Mr. Feldhacker: That's our understanding.

"Mr. Martin: That's correct."

The reason I raise that and have raised that before is to show that the argument that everybody understood (p. 18) or that everybody should have understood that the agreement was over and done with after Mr. Adamson testified in cases he did, is not really accurate. We point this out to indicate to the Court that there was more.

I will say that in relation to that section of the plea agreement, it's—and I'm—I'm familiar with other plea agreements—that is not an uncommon section to appear in plea agreements. Those are similar words; and it's many times a housekeeping procedure that hopefully we can get everything done and we will sentence this man.

That is also something that is not entirely true in this case, because the sentencing—and part of my argument is—the sentencing added nothing here to what was going on with Mr. Adamson. His sentencing actually began to run from the day he was arrested. This is also part of the plea agreement.

So actually when we went through a sentencing, it was more of a ritual than anything else to satisfy the Rules of Criminal Procedure. He was already serving his sentence; and part of it, as I've argued to this Court before, was for Mr. Adamson's safety—to get Mr. Adamson into a form of confinement and custody that was better than the one he was currently in. In fact, that that sentencing took place added very little, if anything, to what was going on.

The fact and the argument has been raised that he (p. 19) is now serving a sentence adds very little to any of the arguments here. That's all wound up in the double jeopardy argument. Double jeopardy does not prohibit a retrial upon original charges, especially where the defendant—

Justice Struckmeyer: Your time has expired.

Mr. Schafer: Well, let me close by saying my purpose in being here is to urge this Court to take jurisdiction from this case and decide that one issue that really decides everything else. Thank you.

Justice Struckmeyer: Mr. Feldhacker, I'll give you a couple minutes if you wish to respond.

Mr. Feldhacker: Thank you, Your Honor. I will, and very briefly. Mr. Schafer has referred to a sentencing in this particular case as a ritual. I don't believe that State versus Lombrano that the court decided—or State versus the Superior Court and Bradford,—indicated that the sentence was merely a ritual.

It's a time for things to come to an end in a particular prosecution, and I think there are many cases who at that point up think the prosecution has almost told this court that it can disregard orders of the Superior Court and brush them aside much as they have also said in their pleadings, that they can disregard the Supreme Court orders for the matters to be before Judge Birdsall. That's just past. It's just over with, and yet that order is still (p. 20) in the files.

They would like to disregard a lot of things, and I'm sure the one main thing Mr. Schafer would like to disregard is that he allowed John Adamson to be sentenced. Surely this Court cannot believe that we would not have waived John Adamson's time for a period of twenty years and two months and then allowed him to be sentenced so that he could have concluded all of his obligations.

Justice Struckmeyer: Counsel?

Mr. Feldhacker: Yes, Your Honor.

Justice Struckmeyer: In your opinion where is the venue to the prosecution of Mr. Adamson?

Mr. Feldhacker: In my opinion, Your Honor, there is no proper venue because there is no jurisdiction before any court. However, if there is going to be any hearings or anything else, I think this Court has indicated where the proper venue would be by telling the Superior Court that it should not be in Maricopa County; and Judge Broomfield entering his orders finding in his discretion

that he feels the proper venue is in Tucson and Pima County.

Justice Struckmeyer: Did he enter a formal order transferring the matter?

Mr. Feldhacker: Yes, he did, Your Honor.

Justice Struckmeyer: Thank you.

(p. 21) Mr. Feldhacker: In fact, just briefly touching on that point, Mr. Schafer said that file's back here in Maricopa County. It has a Maricopa County number. Our Rules of Criminal Procedure provide that even when a place of trial is changed, it shall always remain with the same case number as the county from which it came.

Justice Struckmeyer: Very well.

Mr. Feldhacker: Thanks.

Justice Struckmeyer: Thanks, Gentlemen.

John Harvey ADAMSON,

Petitioner,

V.

The SUPERIOR COURT OF the State of ARIZONA, the Honorable William French, Judge of the Superior Court in and for the County of Maricopa, and Robert Corbin, Attorney General for the State of Arizona, Real Party in Interest: State of Arizona,

Respondents.

No. 14898.

Supreme Court of Arizona, En Banc. May 29, 1980.

HAYS, Justice.

On May 13, 1980 the petitioner filed a Petition for Special Action asking for a stay of proceedings against petitioner, an order prohibiting further prosecution and dismissing the case, and any other and further relief the court deems appropriate. At the initial hearing the court refused to enter a stay but set the petition for hearing on May 28, 1980. Prior to the hearing date, petitioner attempted to have the Special Action dismissed but the court denied his motion.

The factual background necessary for an understanding of the issues raised includes the following: On January 15, 1977 petitioner entered a plea of guilty to an open murder charge in CR-93385, alleging the killing of Donald

F. Bolles; the guilty plea was pursuant to a plea agreement which was accepted by the Honorable Ben C. Birdsall sitting in Tucson, Arizona; the case had been transferred to Pima County for trial; pursuant to the plea agreement, the open murder charge was amended to second degree murder and a sentence of not less than 48 nor more than 49 years was imposed.

Thereafter, pursuant to the plea agreement, petitioner Adamson testified on behalf of the state in the trial of Max Anderson Dunlap and James Albert Robison for the murder of Donald F. Bolles. Both defendants were found guilty and sentenced to death. On appeal to this court, the convictions of Dunlap and Robison were reversed and remanded for a new trial.

A letter dated April 3, 1980 was directed to the Attorney General's office by petitioner's attorney. The letter reads as follows:

"Stanley L. Patchell, Esq. Assistant Attorney General Arizona State Capitol Building Phoenix, Arizona 85007

"Re: State of Arizona vs. John Harvey Adamson

Case No. CR-93385

"Dear Stan:

"I am writing to confirm our telephone conversation of April 2, 1980 wherein we discussed the availability of John Adamson for interviews in preparation for his testimon j in the trials of the State of Arizona vs. James Robison and Max Dunlap.

"As I advised you by phone, I have met with John Adamson at his place of incareration [sic] along with my law partner, Greg Martin. We had lengthy discussions revolving around his expected testimony as well as the plea agreement that he had entered into with the State of Arizona in the above-referenced case number. Further, at that time I also delivered to Mr. Adamson a complete set of transcripts of his testimony in the trial of James Robison and Max Dunlap that was previously held.

"After lengthy discussions and consideration of all of the various aspects of this case and the potential ramifications to Mr. Adamson, I can advise you of the following matters:

- "1. John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona. It is, therefore, his position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of further consideration by the State of Arizona.
- "2. John Harvey Adamson is well aware of the fact that he can be subpoensed by your office to appear as a witness in any criminal matter; however, he is further aware that the fact that he may be called to the stand does not mean that he must testify. He does understand that he may be directly ordered by the Court to testify and, if he refuses to do so, may be held in contempt by the Court.
- "3. John Harvey Adamson is further fully aware of the fact that your office may feel that he has not

completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him. He is aware that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge.

"4. If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met:

"a. The State of Arizona will agree that, upon his completion of his testimony, John Harvey Adamson will be released from custody immediately. The testimony referred to herein is, of course, testimony in an additional trial of the State of Arizona vs. Max Dunlap and, possibly, testimony in a separate trial of the State of Arizona vs. James Robison. If separate trials are held, Mr. Adamson's demand for his immediate release will apply to the completion of his testimony in whichever trial goes first. This demand is not to be considered to be contingent upon any verdict being reached in either case.

"b. If the State agrees to the first condition, an additional condition will be that when John Harvey Adamson is transported to Maricopa County for his testimony in the above-referenced trial, that he will not be held in a facility of the Maricopa County Jail or the Maricopa County Sheriff's Department. It is his demand that he be held in a non-jail facility with the agreement that there will be full time, that being 24-hour, protection by some law enforcement agency, preferably the U.S. Marshal's office, for Mr. Adamson's safety.

"c. As a further and separate demand, John Harvey Adamson wishes to have a complete clothing outfit prior to his testimony in any trial consisting of a new suit, new shoes, socks, etc.

"d. Mr. Adamson further demands that if his testimony is going to be requested by the State, his ex-wife Mary and his son be provided with protection until such time as Mr. Adamson is released from custody. Further, Mr. Adamson requests that an educational fund be set up for his son.

"e. Mr. Adamson further demands that, upon his release from custody, he will be provided with suitable transportation and funds in order for him to travel to a location outside of the State of Arizona to set up a new identification and life for himself. It is anticipated that the State will work through the U. S. Attorney's office and the U. S. Marshal's office in an attempt to comply with this demand.

"f. Further, John Harvey Adamson demands that, prior to any further testimony and/or interviews, he be provided with full and complete immunity for any and all crimes in which he may have been involved.

"The above basically describes what Mr. Adamson's demands are for his future testimony in any case involving James Robison or Max Dunlap. As we have discussed many times in the past with Bill Schafer, the crimes for which John Adamson requires immunity in order to fully and completely answer any cross-examination by defense counsel, are not of such a nature that the State would be shocked for the State to extend immunity for those crimes. Further, I can represent that any immunity involved as

far as any homicide case would be concerned would be an immunity from prosecution for any indirect, and unknowing, participation in any homicide.

"By this letter, it is represented to you that John Harvey Adamson has not been directly involved in any actual homicide outside of the Don Bolles killing.

"After you have had an opportunity to review this letter and Mr. Adamson's demands, I would appreciate your contacting me as soon as possible to let me know what your position is. I would also like to advise you that the demands outlined above are basically non-negotiable demands. Therefore, if you find that there is an absolute prohibition against any of the above, we can anticipate that Mr. Adamson will not be testifying in any trials in the future.

"Again, I would like to re-emphasize the point that it is Mr. Adamson's position that he has fully and completely, and in good faith, fulfilled all of his obligations under the plea agreement. The plea agreement was drafted in such a maner that it was anticipated to be concluded prior to Mr. Adamson's sentencing. It is further our position that, without some type of stipulation, a Superior Court Judge will not have any jurisdiction to change, alter, or withdraw Mr. Adamson's plea agreement and/or sentence.

"I look forward to hearing from you in the near future.

"Very truly yours,

"MARTIN & FELDHACKER
"/s/ William H. Feldhacker
"William H. Feldhacker

WHF: ir CC/John Harvey Adamson" Thereafter, the Attorney General attempted to force petitioner to participate in the preparation of the retrial of defendants Dunlap and Robison. Hearing was held in Superior Court before the Honorable Robert L. Myers with the state urging that petitioner, pursuant to the plea agreement, should be compelled to testify. The state's motion to compel was denied. The Supreme Court declined to accept jurisdiction of a Petition for Special Action brought on this issue by the state.

The state, on May 8, 1980, filed an information in Maricopa County Superior Court under number CR-93385, charging petitioner with the murder of Donald F. Bolles, and a warrant issued. Petitioner's motions to quash the warrant and strike the new information were denied.

The issues raised by this proceeding are:

- I. Has petitioner violated the terms of the plea agreement?
- II. If the plea agreement has been violated, did the state proceed properly in filing a new information under the old number and ignoring the judgment of conviction entered pursuant to the plea agreement?
- III. Is further prosecution of the petitioner barred by the Constitutional prohibition against double jeopardy?

ISSUE I

[1] The record before us is replete with indications of petitioner's refusal to testify further in the Bolles murder cases. We must examine the agreement itself to determine if such refusal is justified. The following excerpts from the agreement provide the answer to this query:

"4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles,

"5. It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's trancribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges will be automatically reinstated: The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five (25) years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement."

We have also read some 35 pages of the change-ofplea hearing wherein the court went through the plea agreement paragraph-by-paragraph, questioning the petitioner as to his understanding of each portion. The court ultimately made the finding that the plea was made voluntarily and intelligently with full understanding and that the defendant was competent to enter the plea.

Although the plea agreement does not specifically spell out the duration of petitioner's obligations it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hesitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or re-trial after reversal.

At the oral argument for the first time, petitioner disclosed the basis for his contention that he had fully complied with the terms of the plea agreement and no longer had an obligation to testify further. He referred to item number 8 of the plea agreement which reads as follows:

"8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it."

The state countered in oral argument by reading the following portion of the transcript of the sentencing hearing:

"THE COURT: All right. The Court's sentencing is limited by the terms of the plea agreement which was entered in this case, which was previously accepted by the Court and the Court is going to proceed with the sentencing in accordance with that plea agreement.

"Do you have anything, Mr. Schafer?

"MR. SCHAFER: Yes. I would like to add one thing.

"I wish the record would show that it has been discussed with counsel, and I believe counsel has discussed it with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.

"THE COURT: The record may show that.

"MR. FELDHACKER: That's our understanding.

"MR. MARTIN: That's correct."

If item 8 specifically appears to limit the availability of the petitioner for additional testimony, the foregoing exchange at the sentencing hearing amounted to a clear understanding that Adamson would testify after sentencing. Petitioner has violated the terms of the plea agreement.

ISSUE II

[2] The attorney general, by filing a new information, albeit under the old number, unilaterally determined that the assignment to the Honorable Ben Birdsall was at an end and that the previous order transferring the trial of the case to Pima County was no longer viable. We do not agree with this position.

We have examined the two cases cited by the state, State v. Rice, 99 Ariz. 14, 405 P.2d 894 (1965), and State v. Johnson, 97 Ariz. 27, 396 P.2d 392 (1964). We do not agree that these cases mandate the filing of a new information nor do they change the definition of the word "reinstate" which is used in the plea agreement.

The state urges that filing a second information in the same action where the first may have lost its vitality is not new in Arizona. As a broad general proposition that may be true, but let us examine such a rule in the context of this case. Although we find sufficient evidence in the record to hold that the plea agreement has been violated, we are aware that at times such a determination might, in another case, require a hearing. See State v. Warren, 124 Ariz. 396, 604 P.2d 660 (App.1979). Who is more competent to make such determination after hearing than the judge who accepted the plea? Secondly, the attorney general lacks authority to make a determination that "the reason for sending the case to Pima no longer exists"; this was determined by a court and only a court can set it aside. Orderly judicial process requires that a determination that the plea agreement was violated be made, that the sentence, judgment of conviction and plea of guilty be set aside and that the original information be reinstated pursuant to the plea agreement. Such procedure has not been followed.

ISSUE III

[3] In his Memorandum in support of the Petition for Special Action petitioner asserts that allowing the state to proceed would be in violation of the prohibition against double jeopardy. Citing Lombrano v. Superior Court, 124 Ariz. 525, 606 P.2d 15 (1980), he contends that at the time the petitioner was sentenced jeopardy attached. State v. Burruell, 98 Ariz. 37, 401 P.2d 733 (1965), is also cited.

We do not disagree with these general propositions of law. The petitioner, however, entered into a plea agreement with the state which by its very terms waives the defense of double jeopardy if the agreement is violated. Obviously a defendant can by agreement waive Constitutional rights. See 17 A.R.S. Rules of Crim.Proc., rule 17.2(c). Having determined that the state should proceed with a "reinstated' information pursuant to the plea agreement, we need not consider the double jeopardy implications of proceeding under a new information.

It is ordered that the relief sought by petitioner is denied. It is further ordered that the new information filed in cause number CR-93385 is dismissed, the judgment of conviction and sentence heretofore entered in cause number CR-93385 are vacated and the original information in said cause charging open murder is reinstated. Further ordered that this cause is remanded to the Honorable Ben Birdsall sitting in Pima County for further proceedings in conformity with the opinion.

The mandate shall issue forthwith.

STRUCKMEYER, C. J. HOLOHAN, V. C. J., and CAMERON and GORDON, JJ., concur.

U.S. District Court

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

[Adamson v. Hill]

(Filed June 20, 1980)

The Petitioner, JOHN HARVEY ADAMSON, by by and through his attorneys undersigned, submits the following Supplemental Petition for Writ of Habeas Corpus pursuant to 28 U.S.C., §2254, and for said Supplemental Petition alleges as follows:

I

This Petition is filed pursuant to 28 U.S.C., §2254, et seq.

II

On June 13, 1976, the Petitioner was arrested for the murder of Don Bolles, alleged to have occurred on June 2, 1976 in Phoenix, Arizona. Subsequent to that date, an Information was filed in Maricopa County Superior Court, Criminal Cause No. 93385, charging the Petitioner with murder, open.

III

The Petitioner was held in custody without bond. The minute entry evidencing trial court's determination that Petitioner was not entitled to bail is attached hereto, denoted as Exhibit "A" and incorporated by reference herein.

IV

On January 15, 1977, after a change of the place of trial, Petitioner entered into a plea agreement with the State of Arizona agreeing to plead guilty to murder, second degree, in exchange for a sentence of forty-eight (48) to forty-nine (49) years imprisonment with a release date of twenty years two months to date from June 13, 1976. Said plea agreement called for Petitioner's testimony in a number of criminal prosecutions including any having to do with the killing of Don Bolles. That plea agreement is attached hereto, denoted as Exhibit "B" and incorporated by reference herein.

V

On January 15, 1977, Petitioner entered his plea of guilty pursuant to the said plea agreement and on January 19, 1977 the trial court accepted the terms and conditions of the agreement. The trial court's minute entries of January 15 and January 19, 1977 are attached hereto, denoted as Exhibits "C" and "D" and incorporated by reference herein.

VI

On December 7, 1978, judgment of guilt as to the Petitioner was entered by the trial court and pursuant

to the agreement the Petitioner was sentenced to 48 to 49 years imprisonment. The trial court's minute entry of December 7, 1978 is attached hereto, denoted as Exhibit "E" and incorporated by reference herein.

VII

During the period of time from January 19, 1977 to December 7, 1978, pursuant to the plea agreement, Petitioner testified a trial in State of Arizona vs. Stan Tanner and James Robison regarding the alleged beating of talent agent, Les Boros. During this period of time, Petitioner testified at the preliminary hearing and at trial in State of Arizona vs. Max Dunlap and James Robison in connection with the alleged murder of Don Bolles. Further, during this same period of time, Petitioner testified at trial in United States of America vs. James Robison and Neil Roberts in connection with the alleged attempted bombing of the Bureau of Indian Affairs Building in Phoenix. All of the defendants were convicted of the criminal offenses with which they were charged.

VIII

On February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison for the murder of Don Bolles. Thereafter, Petitioner, in a good faith belief that he had complied with all of the terms and conditions of the plea agreement, in a letter from his attorney to the Attorney General of the State of Arizona, set forth the conditions on which he would testify at the retrials of Mr. Dunlap and Mr. Robison. That letter is attached hereto, denoted as Exhibit "F" and incorporated by reference herein.

IX

On April 9, 1980, in response to Petitioner's letter, the Attorney General of the State of Arizona responded in writing and informed the Petitioner that by virtue of his position as set forth in his letter, Petitioner would be considered to be in violation of the plea agreement and subject to prosecution once again for the murder of Don Bolles. That letter is attached hereto, denoted as Exhibit "G" and incorporated by reference herein.

X

After unsuccessful attempts by the State of Arizona to compel the Petitioner to testify at certain pre-trial hearings regarding Mr. Dunlap and Mr. Robison, said attempts being directed at the trial court and the Arizona Supreme Court, the prosecution filed a new Information in Maricopa County Criminal Cause No. 93385 on May 8, 1980 against the Petitioner alleging the murder of Don Bolles. A warrant for Petitioner's arrest issued. The new Information and the warrant for Petitioner's arrest are attached hereto, denoted as Exhibits "H" and "I" and incorporated by reference herein.

XI

Petitioner filed a motion on May 9, 1980 to quash the arrest warrant and strike the information from the file. Petitioner's motion is attached hereto, denoted as Exhibit "J" and incorporated by reference herein.

XII

On May 12, 1980, the Honorable William P. French, Judge of the Maricopa County Superior Court, denied Petitioner's Motion to Quash the Warrant and Strike the Pleadings. A copy of the court's minute entry is attached hereto, denoted as Exhibit "K" and incorporated by reference herein.

XIII

On May 13, 1980, Petitioner filed in the Supreme Court of the State of Arizona a Petition for Special Action citing abuse of discretion on the part of Judge French in denying Petitioner's Motion to Quash the Warrant and Strike the Pleadings. Further, Petitioner alleged that a second prosecution was in violation of the double jeopardy clauses of the United States and Arizona Constitutions. The Petition for Special Action is attached hereto, denoted as Exhibit "L" and incorporated by reserved herein.

XIV

After a hearing on May 28, 1980, the Arizona Supreme Court on May 29, 1980, filed their written opinion denying Petitioner's relief prayed for in his Petition for Special Action. The Court, acting in an arbitrary and capricious manner and abusing its discretion, (1) found that the Petitioner was in violation of his plea agreement and had waived his claim to double jeopardy, (2) dismissed the new Information filed in Cause No. CR-93385, and (3) vacated the conviction of the Petitioner and the sentence imposed in that cause number and reinstated the original Information charging open murder. The mandate issued forthwith on that date. The Court's written opinion is attached hereto, denoted as Exhibit "M" and incorporated by reference herein.

XV

A determination was made by the Arizona Supreme Court that Petitioner was in violation of the plea agreement when no evidentiary hearing had been conducted. The fact-finding procedure employed by the Arizona Supreme Court was not adequate to afford a full and fair hearing and, in fact, the material facts regarding the issue of the violation of the agreement were not adequately developed at the lower court level and, accordingly, Petitioner was denied his due process rights guaranteed by the United States and Arizona Constitutions.

XVI

On June 6, 1980, Petitioner appeared before the Honorable Ben Birdsall of the Pima County Superior Court and a trial date was set for July 29, 1980. Petitioner remains in custody in this matter without a bond.

XVII

Petitioner has exhausted all available State remedies in an effort to obtain relief on the issue of double jeopardy.

XVIII

If Petitioner is permitted to be prosecuted again for the murder of Don Bolles, having been once convicted, sentenced, and having served approximately four years of said sentence for the murder of Don Bolles, a second prosecution will be in violation of the Petitioner's Constitutional right to be free from being placed "twice in jeopardy" for the same offense. Further, to subject Petitioner to prosecution again creates such a threat of great immediate and irreparable injury to Petitioner that there exists at the present an extraordinary pressing need for immediate Federal equitable relief in the form of an immediate stay of the State Court proceeding to preclude the State of Arizona from continuing this flagrant, bad faith attempt to deny Petitioner his Constitutional rights.

WHEREFORE, the Petitioner, JOHN HARVEY ADAMSON, prays this Honorable Court order that the Respondent Attorney General for the State of Arizona file a response or other appropriate pleading in this matter; that this matter be set for a hearing before a Judge of this Court; that an Order staying all further proceedings in Maricopa County Superior Court Criminal Cause No. 93385 be entered until this Court can resolve the issues now before it presented by this Petition; and that upon conclusion of the proceedings that a Writ of Habeas Course issue from this Court directing the Respondents to cease and desist from and to terminate the prosecution of the Petitioner.

RESPECTFULLY SUBMITTED this 20th day of June, 1980.

MARTIN & FELDHACKER

By: /s/ Gregory H. Martin

By: /s/ William H. Feldhacker 5829 N. 7th Street, Suite 1-C Phoenix, Arizona 85014 Attorneys for Petitioner STATE OF ARIZONA)
County of Maricopa)

JOHN HARVEY ADAMSON, being first duly sworn, deposes and says:

That he is the Petitioner in the foregoing matter; that the matters set forth therein are true; that those alleged on information and belief, he believes to be true.

/s/ John H. Adamson

SUBSCRIBED AND SWORN TO before me this 20th day of June, 1980.

/s/ William H. Felhacker Notary Public

My Commission Expires:

Illegible

[Caption omitted]

(p. 2.) U.S. DISTRICT COURT

Phoenix, Arizona September 26, 1980

PROCEEDINGS

The Clerk: Civil 80-502 Phoenix, John Harvey Adamson versus Jerry Hill, et al., on for Petitioner's Writ of Habeas Corpus and State of Arizona's Motion to Dismiss.

The Court: Yes?

Mr. Martin: Gregory Martin, William Feldhacker, for the Petitioner, Your Honor. We are ready.

The Court: Are you ready to go ahead?

Mr. Schafer: Bill Schafer from the Attorney General's office.

The Court: Go ahead. I have read what you have to say so please emphasize whatever you wish to emphasize.

Mr. Martin: It's certainly not my intention to reiterate orally what I have set forth in writing. We have briefed it quite extensively. I would like to make a very short statement regarding our position and by its nature I think I will touch upon some of the matters that I have covered already.

As you are aware, Mr. Adamson entered into a plea agreement whereby he agreed to plead guilty to murder (p. 3) in the second degree and to a stipulated sentence; in exchange he further agreed to cooperate in a number of anticipated prosecutions and he did cooperate with the State of Arizona in that regard and with the U.S. Government. Judgment of guilty was entered and he was sentenced in December of '78.

After Mr. Dunlap and Mr. Robison's reversal of the convictions sustained by them in the State Superior Court, Mr. Adamson indicated to the State that he wanted further concessions from the State for any additional cooperation on his part.

Our position, your Honor, is that Mr. Adamson has fully and completely fulfilled his obligations under that plea agreement.

Now, the Arizona Supreme Court stated in their opinion that the agreement contemplated his availability at any re-trial of Mr. Dunlap and Mr. Robison should their conviction be reversed. That is simply not true—it's our position. Mr. Adamson expressly agreed to testify fully in all of those matters and he further waived the time for sentencing and he agreed to be sentenced only after completion of his testimony in all of those cases. The State of Arizona requested that he be sentenced in December of 1978 not Mr. Adamson.

To protect itself, all the State of Arizona (p. 4) had to do was to postpone Mr. Adamson's sentencing to which he had expressly agreed and he would have been obligated to testify at any re-trial regarding Mr. Dunlap and Mr. Robison. I would hope that this Court would not share the opinion that I assume Mr. Schafer has at this point in time in connection with the fact that the entry of judgment and the imposition of sentence in this case is a mere ritual, as he has said before, and virtually meaningless. It's our contention that the entry of judgment and the sentence imposed was totally significant and in fact signaled an end the Mr. Adamson's obligation to testify.

The Court: Why do you have a plea agreement then?

Don't you have a plea agreement as sort of a quid pro quo?

Generally the theory behind a plea agreement of that type is that somebody will testify for the purpose of doing a certain thing and in return for that, get preferential treatment. If the doing of a certain thing you would argue, of course, has been done, the State would argue it hasn't been done because the conviction was set aside. I assume the State had in mind that it would be seen through to the end of a conviction or a determination of not guilty—the parties against whom he testified in any and all trials, and for that reason they would say, that is why you would not have a trial against you for murder, first degree murder.

(p. 5) Mr. Martin: I'm not sure what the State had in mind at the time they initially entered into the agreement in January of '77.

The Court: You would think the State would have in mind, in any event, that a person would have preferential treatment on a first degree murder charge with the notion that the other parties might—if there were a re-trial that that would be the end of the obligation?

Mr. Martin: I don't doubt that they probably had it in mind that they wanted Mr. Adamson available at retrial. The only problem is that they didn't make that known to Mr. Adamson and that was not the part of the agreement that was entered into by Mr. Adamson. What he agreed to do was in essence—

The Court: (Interposing) Any and all trials.

Mr. Martin: Yes, and he agreed to waive his time for sentencing and he agreed to be available at all trials prior to sentencing and all they had to do was to postpone the sentence until they were sure if in fact the convictions were reversed that he would be available at the end. All they had to do was postpone his sentencing and he would have been available because he expressly agreed to that. But when they sentenced him, judgment was entered. It signaled an end to the proceedings, an end to his obligations, and a finality at least at the trial court level (p. 6) to this particular case. And I think it's simple now because he is being prosecuted in Tucson. He is being twice placed in jeopardy. It's a fundamental constitutional guaranty that he has, and accordingly you have jurisdiction to resolve this dispute.

The Court: He would only be twice in jeopardy if in fact the plea agreement had not been violated and the State did not have a right to try him, if he violated his plea agreement.

Mr. Martin: It's our position he fulfilled the obligation of the plea agreement. Thank you.

One other thing. If you are not prepared to rule today we would ask that an order issue from this Court staying the proceedings which are now pending in the Pima County Superior Court.

The Court: I will be prepared to rule today because I have considered the whole matter very carefully and I just wanted to hear what you all had to say.

Mr. Schafer: May it please the Court. I, too, will be short. I know you have reviewed these as you do in every case.

As to the first point, we have argued in our brief before the Court that for the Petitioner to go back at this time and re-argue the original plea agreement is not a Federal question. That is a State question, which should (p. 7) not be handled on habeas corpus. I have cited just about every close case I could find to the Court but I confess I could not find any on plea agreements. I think I found some close cases, but that is all

The Court: Doesn't any matter that raises a question on the constitution that has been adjudicated in the State Courts—isn't this a matter, then, that can be presented to the Federal Court?

Mr. Schafer: It certainly is, and that is my second point, that that issue is here. I have said that in the brief. The double jeopardy issue. The issue, however, of what is meant by the plea agreement is not here. The only issue that we submit that is here at all is, once having determined, as the highest court in the State has, that the plea agreement was broken and that it was voided, may Mr. Adamson now be tried for the first time for a first degree murder, and I really see that as possibly two issues.

The one is the general issue, can he be tried at all? Does double jetopardy prevent his now being tried for anything? In this case we are only concerned with two degrees of murder, and I think I have argued to the Court basically in our memo that constitutional rights including the Fifth Amendment double jeopardy right can be waived, and our argument is that in this situation in these circum- (p. 8) stances Mr. Adamson has knowingly, intelligently and upon the advice of counsel waived any right he would have to claim double jeopardy.

The Court: There is no question constitutional rights can be waived. When you waive your right to a jury trial you are waiving your right to a constitutional right. When you waive your right to have a case presented to a Grand Jury you are waiving your constitutional right. So there are many constitutional rights that can be waived, if they are knowingly and intelligently waived.

Mr. Schaffer: We maintain the double jeopardy right is also one of those. That has been questioned in some cases. The latest U.S. Supreme Court case I have been able to find is Menna versus New York,—I believe it is 423 U.S.—and in footnote 23 in that case, because it might appear from a reading of the opinion itself without the footnotes that what the Court is saying is, you cannot waive your Fifth Amendment double jeopardy rights but the footnote says we are not intending to hold that. All we are passing on in this case is an interpretation of the Tollett versus Henderson case. That is our first point: that Mr. Adamson waived his rights to double jeopardy and may now be tried for murder.

The second ancillary issue is, I suppose, if that is true, may he also be tried for first degree murder because (p. 9) he only pleaded to second degree murder and there are, I am sure the Court is aware, a host of cases talking about a jury finding impliedly or explicitly, a defendant not guilty of a higher charge—but convicting him on the lesser charge.

To answer that contention I have cited the Court I believe nine different cases, six of them being Federal opinions to show specifically in a plea bargain situation that where the initial higher charge is dropped in return for a plea to a lesser charge, there can be a trial on the higher charge. As a matter of fact Santobello—perhaps the seminal case on plea agreements and negotiations—also says that in the footnote. In that case I believe there were

two charges dropped. The Court states in it's [sic] opinion that the defendant pleaded guilty to a lesser included charge. In the footnote they say, of course, when this goes back to trial court, he will plead to the original charges. There is dicta in a 9th Circuit case, U.S. versus Wells following up on Santobello saying the same thing. Of course, when this individual goes back he will have to answer to the higher charges.

We submit that on the basis of the cases that we have submitted to the Court, and I couldn't find any to the opposite. There is one case that I have cited that held the opposite, but that was overturned. At this point (p. 10) I believe that all of the authority that I could find, I believe all the authority that anybody could find, would show that an individual in a fact situation like Mr. Adamson can be tried on the original higher charge that was dropped initially.

The Court: Well, and the knowing and voluntary agreement is null and void and the original charge would be automatically reinstated in the event of the breach of the agreement and the agreement you read as being one that he is willing to testify at any and all trials including any retrial and that having not so testified, having refused to so testify, and having entered into the agreement we just discussed, he has violated that and therefore he has waived any right for claiming of double jeopardy even though he had previously been sentenced.

Mr. Schafer: Yes, and I would add to that not only the agreement itself but when he orally entered his plea before Judge Birdsall, every paragraph of the plea agreement was gone over and he was asked with his attorneys present if he understood what was being said and what was being agreed to and he agreed to every paragraph including that one. And again at the judgment and the sentencing, there was a statement in the record showing that this was all known, understood and agreed to.

I have nothing further, Your Honor, unless (p. 11) there are questions.

The Court: Go ahead. No, I have no questions. Do you wish to reply?

Mr. Martin: The only thing I would say in reply, Mr. Schafer initially said that with respect to what is meant by the plea agreement question that you should concern yourself with—what is meant by the plea agreement is not a question that you should concern yourself with. I disagree because at the State Court level there was never any type of a hearing held to determine in fact, for instance, as regarding the question you posed to me, what was in the State's mind. What did the parties agree to when they entered into this agreement in January of 1977? There was never a hearing held on that issue—notwithstanding that, the Arizona Supreme Court found that he was in violation.

The Court: Didn't the Respondent ask the Supreme Court to take jurisdiction of the action and decide whether the Petitioner is obligated under his agreement? Didn't they put that before the Supreme Court?

Mr. Martin: What we did was simply, it was an attempt to test Judge French's ruling which was based on the record.

The Court: You are not really answering my question. Wasn't that put before the Supreme Court in those (p. 12) words? I am looking at Respondent's memorandum at 4. They asked the Supreme Court to take jurisdiction of the special action and decide the issue whether the Petitioner is obligated to testify under the agreement and there was no objection as the record discloses on your part to that issue being put before the Supreme Court.

Mr. Martin: I don't have the Petition before me but I am sure that is what it says. What I am trying to say now is that notwithstanding that, the hearing wasn't afforded Petitioner and it reaches constitutional dimensions because he has not been afforded due process and that should concern you in connection with the interpretation of the plea agreement. That is all I have.

The Court: Well, I will have a written order within an hour on this matter. Thank you.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CIV 80-502 PHX CAM

JOHN HARVEY ADAMSON	,)
Peti	itioner,)
vs.) ORDER
JERRY HILL, Sheriff of Mar County; State of Arizona; et	
Respon	ndents.)

This Court, having received and considered Petitioner's Petition for Writ of Habeas Corpus, Supplemental Petition for Writ of Habeas Corpus, and Memorandum in Support of Petition for Writ of Habeas Corpus, filed June 25, 1980, and having entered an Order on June 25, 1980, granting Respondent twenty days in which to respond, and having received and considered Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus, filed July 21, 1980, and Petitioner's response thereto, filed July 31, 1980, finds and concludes as follows:

(Filed Sept. 26, 1980)

- 1. That Respondent has failed to reply within the five (5) days allowed by Rule 11(d), Local Rules of Practice, and is therefore considered to have waived the opportunity to reply to Petitioner's response to Respondent's Motion to Dismiss:
- 2. With respect to Petitioner's contention that the Arizona Supreme Court's ruling that Petitioner had breached his plea agreement violated his right to due process of law, this Court finds and concludes as follows:

- (a) That in Respondent's memorandum in support of its Response to Request for Special Action, dated May 16, 1980, Respondents urged the Arizona Supreme Court to "take jurisdiction of this special action" and decide the issue "whether petitioner is obligated to testify under his agreement". Respondent's Memorandum at 4.
- (b) That Petitioner does not allege, and the record does not reflect, that Petitioner objected to the State Supreme Court's resolution of the above issue.
- (c) That the opinion of the Arizona Supreme Court in this matter discloses that Petitioner was given the opportunity at oral argument to disclose "the basis for his contention that he had fully complied with the terms of the plea agreement and no longer had an obligation to testify further." Adamson v. Superior Court, No. 14898 (Az. S.Ct. May 29, 1980), at 8.
- (d) That, in addition to oral argument, the record disclosed that the state court also considered the plea agreement itself, the transcript of Petitioner's change-of-plea hearing, and a letter by Petitioner's counsel to the Assistant Attorney General, dated April 3, 1980, representing Petitioner's position that

his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will be given only upon the offer of further [specified], consideration by the State of Arizona

and further stating that Petitioner

is well aware of the fact that your office may feel that he has not completed his obligations under the plea agreement . . . and, further that your office may attempt to withdraw that plea agreement from him . . . [and] that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge.

- 3. With respect to the issue whether the State's reprosecution of Petitioner violates the double jeopardy clause of the fifth amendment, this Court finds and concludes as follows:
- (a) That Petitioner's refusal to testify at the retrials of Dunlap and Robison violates his plea agreement and, under the terms of that agreement, said refusal constitutes Petitioner's consent that the "agreement is null and void and that the original charges will be automatically reinstated."
- (i) This Court having considered the entire record before it further finds and in the alternative agrees with the findings of the Arizona Supreme Court that

Although the plea agreement does not specifically spell out the duration of petitioner's obligation, it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hestitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or retrial after reversal.

Adamson v. Superior Court; supra, at 7-8. See ¶¶ 4 and 5 of Petitioner's Plea Agreement.

(ii) That ¶8 of Petitioner's agreement, which states that the parties would "waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement, and Exhibits A and B which accompany

it," cannot be interpreted as a statement that Petitioner's obligations pursuant to the agreement would cease upon his sentencing, but rather was intended, and the Arizona Supreme Court found, to fix a time for sentencing, *Id.* at 9-10.

- (b) That the record establishes that Petitioner's consent that the "agreement is null and void and the original charges will be automatically reinstated" in the event of a breach of the agreement, constitutes a knowing and voluntary waiver of the defense of double jeopardy.
- (i) In this regard, we agree with the Findings of the Arizona Supreme Court that, Petitioner was aware at the time he entered his plea that his obligation to testify regarding the crimes referred to in the agreement would continue until the matters were resolved—regardless of whether he was sentenced prior to that time. *Id.* at 9.
- (ii) That ¶8 of Petitioner's agreement see supra at ¶(3)(a)(ii), was not intended, nor can it be interpreted as a statement that Petitioner's obligations pursuant to the agreement would cease upon his sentencing, but rather was intended to fix a time for sentencing and to insure that Petitioner would waive any defenses that might otherwise result from the delay. Adamson v. Superior Court, supra, at 9-10.
- c) That, in view of the foregoing; Petitioner cannot now claim that his reprosecution is barred by the double jeopardy provisions of the fifth amendment of the United States Constitution.
- 4. That for the above reasons, Petitioner's Petition for Writ of Habeas Corpus, upon reconsideration, is

deemed legally frivolous and Respondent's Motion to Dismiss is hereby granted.

DATED this 26 day of September, 1980.

/s/ C. A. Muecke Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CIV 80-502 PHX CAM

JOHN HARVEY ADAMSON,

PLAINTIFF,

VS.

JERRY HILL, Sheriff of Maricopa County, State of Arizona, et al.,

DEFENDANT.

October 21, 1980

ORDER

This Court, having received and considered Petitioner's Motion for Amendment of the Court's Findings and Amendment of the Judgment, the exhibits attached thereto, the State of Arizona's Response, and the Petitioner's Reply, finds and concludes:

- (1) That it is neither the intent nor the purpose of a Motion for Amendment of Findings to allow a party to relitigate the merits of a case or to present evidence for the first time, which could have been presented originally. F.R.Civ.P., Rule 52(b); Wright and Miller, Federal Prac. and Proc., § 2581, p. 722, and the cases cited therein.
- (2) That even had the matter been appropriately presented to the Court, the Motion does not justify the relief requested by the Petitioner;
 - (a) The record does not establish that petitioner objected to the Supreme Court's disposition of the issue as to whether the petitioner had breached the Plea Agreement;

- (b) In fact, the transcript of the parties' arguments in front of the Arizona Supreme Court reveals that the attorney for the Petitioner discussed at length the merits and substance of the agreement. (Transcript at p. 6, 1.15, through p. 8, 1.1);
- (3) That even had the Petitioner presented a meritorious claim in a procedurally correct manner, where the question is a matter of state law (i.e. the interpretation of a plea agreement), the lack of an evidentiary hearing is not a ground for federal habeas corpus relief. Townzen v. Craven, 444 F.2d 315 (9th Cir. 1971).

Therefore,

IT IS ORDERED that petitioner's Motion for Amendment of the Court's findings, Amendment of the Judgment, and Vacation of the Order of the Arizona Supreme Court is denied.

> /s/ C. A. Muecke Chief United States District Judge

cc: Martin & Feldhacker Attorney General

(p. 68) In The Superior Court of Arizona

Sentencing Nov. 14, 1980 [excerpt]

The Court: All right. Mr. Adamson.

The Defendant: Yes. Would it be more convenient for the Court if I took the witness stand or would it be more convenient if I addressed the Court from here?

The Court: You may address me right from there unless you prefer to take the stand.

The Defendant: I prefer to take the stand, if I might, Your Honor.

The Court: All right.

The Defendant: It this on? Yes.

First of all, Your Honor, I would like to apologize to the Court for my appearance today. It seems that Mr. Right Hand was given my suit to have cleaned and Mr. Left Hand was supposed to deliver it and Mr. Left Hand never showed up.

Your Honor, the answer to the question is I don't know. The question is, how did we get here from there?

The State's argument, which has been very effective today, is that it's really a very simple matter. Either the plea agreement has been violated or it has not (p. 69) been violated, and if it has been violated then this is the penalty that's called for in it.

I contend that it is not a simple matter of whether or not the plea agreement has been violated and the reason that it is not a simple matter is because of a word near and dear to everybody's heart by now, particularly Max Dunlap, Jimmy Robison, Neal Roberts, Kemper Marley, and now the great possibility of others, immunity.

I was never afforded the opportunity of refusing to cooperate and could not because of the threat of prosecution to answer questions to me posed by the State of Arizona allowing it to become the simple matter the State contends that it is.

I submit to this Court and parties present that it is not a mere simple matter, but a very complex series of occurrences if that's all it is.

Since coming to Tucson and all the exposure I have had to this Court three things particularly stand out in my recollections and always have.

One, the Court's fairness; two, the Court's intelligence; and, three, the Court's attention to detail and thoroughness.

That is why in 1977 when the Court accepted and signed the plea agreement which at that time had been (p. 70) negotiated between the State of Arizona and my lawyers I paid particular attention to the rights that I was waiving, and in particular to the 30-day sentencing provision as stipulated and based on Your Honor's findings at the time. I understood I would not be sentenced until my testimony was concluded and the State, and since you were a party to the agreement, you, Your Honor, were also satisfied that I had lived up to my end of the contract. In effect what I had done by waiving my time for sentencing until the State of Arizona was satisfied, was effectively giving them 20 years, one month and 29 days because what was determined my time for sentencing was not tied to a time, it hinged on my performance and when that performance was concluded to be determined again with the State of Arizona.

As long as I was sentenced prior to the expiration of my 20 year two month period of incarcaration, and certainly common sense dictated then as it does not that I couldn't be sentenced after my period of incarceration, so just to make sure I looked up the word conclusion. It has been years since I have done this, but I recall that it meant the final act of a legal pleading or trial.

Thinking I may have perhaps by chance misunderstood something, I looked up the word final, and (p. 71) again it's been years, but I think I recall the definition of the word final meaning the unalterable end.

In short, between my own observations, my lawyers' advice, and the absence of anything in the record from this Court and anything in the contract itself, to me there was only one reason to sentence me. As Paragraph 8 of that plea agreement says, to conclude my testimony at such time the charges would be dismissed and that to me signalled finality, an end, a time when everybody was satisfied that I had told the truth, that I had done whatever I said in the plea agreement that I was going to do according to the terms of that agreement.

My thanks for cooperating according to that agreement was my sentencing.

When the State had determined I had fulfilled my promise under the agreement, Bill Schafer contacted my lawyers and indicated it had been determined it was time to sentence me. My lawyers then inquired at that time, Mr. Schafer, are you sure you want to sentence John Adamson? Don't you want to wait until some of these appeals are back on—on—particularly the Bolles case, before he is sentenced?

Mr. Schafer said, no, it's time for John to be sentenced.

My lawyers again said, are you sure you (p. 72) want John Adamson sentenced? Mr. Schafer again said, yes, it's time. So as Your Honor well knows I was sentenced.

The hearing—the State mentioned the possible need for further testimony in the Asher [sic] plumbing matter which wasn't mentioned directly by name, but had been discussed between my counsel and the State. And I felt then, and as I do today, that since that case was originally part of that plea agreement I was honor bound, if not legally bound, after my sentencing to cooperate with the State of Arizona since in fact in my own mind that was part of the consideration that I was receiving for my honest and truthful testimony.

So I said, yes, certainly, of course, there is no problem in calling me back for further testimony in that case.

After the sentencing Bill Schafer even admitted to my lawyers that he really didn't know what could be done now that I had been-sentenced now that the case was reversed. But more importantly, he hadn't precluded the possibility of my improving my position by further negotiation if in fact the Bolles case was reversed, especially in light of future cooperation he was now aware of I had agreed to tender if the federal agencies and others in the prosecution of others in some (p. 73) very serious matters and an agreement that I was later to arrive at in 1979 with the Department of Justice in that pursuit.

While it wasn't stipulated or specifically understood, it left the situation I describe open, but perhaps ambiguous. I was sentenced, of course, December 7, 1978, and according to conversations with Mr. Jennings preceding that, went into federal custody on December 8th.

In 1979 I returned and testified in the Verive case without any inducement as you have heard today, without an agreement, just because I was asked. And I entered into an agreement with the federal government the same year wherein I was to provide information and testimony in other serious criminal matters, to be kept in federal custody in a witness protection program as long as I felt there was a threat to my life. And I began providing information at that time and have continued to do so presently.

On February 25th, of course, the Bolles case was reversed. Because I had been forced to take the Fifth Amendment due to the lack of immunity, not allowing me to answer the questions, immediately the question of my legal responsibilities under the plea agreement came to mind and in discussion with my attorneys preliminary indications were that the agreement had been concluded (p. 74) with my sentencing, but certainly that it was a legal issue and a hearing would—would provide the answers. It would determine whether or not, in fact, our position was right or perhaps that it was wrong, but at least I would be entitled to a hearing to determine where—where both parties' legal positions stood.

And in particular, after Bill Schafer's statement to my lawyers after the sentencing that—I felt that it was ambiguous, that there wasn't a—a full, complete understanding as to what the State's understanding of the plea agreement was or—or my responsibilities under it, and certainly I realized after the court experiences I have had this is only my opinion as to what this contract meant. So, again, I was thinking there was going to be a hearing certainly over the legal issue of where everybody stood according to the agreement.

A brief period of time following the reversal, Bill Schafer in an interview with a newspaper reporter in Phoenix by the name of Pat Zabo indicated that a new agreement could be negotiated with either side negotiating more. This confused me a little bit, for why is it the State would want to renegotiate more from me when I had done everything I said I was going to do under the plea agreement as evidenced by the fact that they had (p. 75) thanked me for my cooperation and agreed I had done everything I was supposed to do by the mere fact that I had been sentenced by Your Honor. I couldn't understand that. It didn't make sense to me. Why would they want more from a witness that—that had testified for them, provided evidence for them, and in short did everything that was legally required of him? I didn't understand it.

The only thing I can see that—the way the State could renegotiate more from me was to charge me with an additional crime or crimes.

So in good faith I entered into plea negotiations with the State of Arizona through my lawyers, not wishing to communicate directly with them because of what may have meant by them wanting more and perhaps them filing new charges against me.

These negotiations culminated with my letter to the State of Arizona dated April 3, 1980, which by now has become infamous, wherein, among other demands, I demanded my release from the penitentiary after the first retrial of Max Dunlap after it became obvious to me the State was not going to start the process by even asking for my cooperation by saying please.

In short, Your Honor, I asked for the moon and I don't know what the usual process is for negotiating a plea agreement, but that's the way I started with it. (p. 76) It may be considered untutored, and perhaps it was in error, but it was done in good faith.

And there still at that time remained the legal issue of what my responsibilities were under the '77 plea agreement if any. But my position was and still is that my agreement was concluded with my sentencing. For as long a time as the State needed I had given them by waiving my time requirements for sentencing at which time the heat from the Bolles case would have died down, I could have changed my name and records, and faded into the general population of some institution and finished the remainder of my 48- to 49-year sentence because there was no plan in cooperating any further with anybody at the time the plea agreement was negotiated other than the four cases that were mentioned in it.

The Court: Just one second. You're reading and that causes you to go faster than you might ordinarily. I want to make certain the court reporter gets this.

The Defendant: I'm also a little bit nervous, Your Honor.

The Court: Just give him a rest for a minute.

The Defendant: Okay.

The Court: Then if you can, go just a little slower. I don't mean real slow.

The Defendant: I understand. I apologize.

(p. 77) On April 9, 1980, the State of Arizona sent me a letter not asking for my cooperation, but rather saying I had violated the plea agreement and was going to be tried—charged and tried for first degree murder, that they, the State, apparently had determined that I had violated the plea agreement by refusing to be interviewed. This left me more perplexed for how could I have violated the agreement

by trying to negotiate one based on their representation and with no hearing being held to determine the legal position of either party based on the evidence presented and the prevailing case law which applied to the situation by a Judge. And who better to determine if the plea agreement had been violated than Your Honor, the Judge who accepted and signed it.

I was subpoensed to Judge Myers' court to testify at a bond hearing for Max Dunlap Friday, the 18th of April, 1980. At that hearing I answered the one question I could answer, did you tell the truth at the preliminary hearing against Max Dunlap? To which I answered yes.

But because of the State's representation that they were going to try me for first degree murder, and on advice of counsel, I took the Fifth Amendment some 136 times, I think it was, and again found myself (p. 78) without enough immunity to answer the questions which were posed to me.

The State filed first degree murder charges against me Thursday, May 8, 1980, I think was the date, for the Bolles killing.

I now stood charged with a crime to which, one, I had already been charged; two, plead guilty to; three, been found guilty of; four, had been sentenced because of to 48 to 49 years to be served 20 years two months from June 13, 1976, day for day with no good time available on the sentence of any kind; and, five, had served now some 47 months of that sentence.

I was more confused for it made no sense to me at all if convicted what sentence was I to serve first, the one I already had or the one I was going to get or would they run concurrently.

Some of my questions were answered yet still more posed. Friday, May 30, 1980, I believe was the day when the Arizona Supreme Court, I contend still with no hearing and without being requested, ruled that I had violated the plea agreement and vacated my 48- to 49-year sentence and opened up final judgment by ordering that I be tried for first degree murder.

The following Monday—Monday, June—June 2nd, I call my lawyers and it was a ranged to—(p. 79) Stan Patchell from the Attorney General's Office was present in their office. I stated that while I felt uncomfortable from a legal standpoint, particularly a due process standpoint, and I felt that jeopardy had been attached at the time of my sentencing, that the only right thing for me to do under the circumstances, since there now in fact had been a judicial determination that the plea agreement had been violated, was to continue the cooperation.

I told my lawyers, reinstate the 20-year plea agreement, give me enough immunity so I can answer the questions, and we'll continue prosecuting the case.

The State found that unacceptable. They demanded a life sentence of 25 years. Now, instead of saying please they were saying thank you by adding nine years onto my sentence. The four years I had already served, which was vacated, and the additional five years of a life sentence.

On Wednesday, August 6, 1980, I was withdrawn from federal custody, violating the agreement I had signed with the Department of Justice keeping me in federal protective custody because of the severe danger to my life in return for me providing information and testimony against others.

On Wednesday, August 27th, with no agreement, (p. 80) inducements, and while awaiting trial for the first

degree murder charges here in this court, as I had indicated to Ron Jennings a long time previously, I went before a Federal Grand Jury in Phoenix in which three indictments were returned over a bombing in 1975. That trial, I believe, is set in January 1981 in San Diego and I will testify in that trial.

Again, on Friday, September 12, 1980, with no inducements or agreements and while in the process of jury selection on this matter here, again as I represented to Mr. Jennings a long time ago, I was taken to San Diego for the retrial of the B.I.A. case against Jimmy Robison and Neal Roberts. But a delay by the Ninth Circuit Court of Appeals in that case precluded trial at that time. When scheduled I will testify in that trial, Your Honor.

A phone call to Ron Jennings Tuesday, September 30, 1980, while in jury selection here in Tucson, Mr. Jennings discussed the severe danger to my life and it would be to everyone's benefit if I could consider pleading to first degree murder and an additional 50 federal years, the State time to run concurrent with the Federal time, if possible, when my sentencing was concluded and again I had lived up to my promise under the new contract to negotiate with the State of Arizona. So at least I could get back in federal custody where my (p. 81) safety could be assured.

I don't know if anybody in this courtroom has done time, but it doesn't go any faster because you say it quick. That's a lot of time.

I said, yes, that I would do that. I would plead guilty to a life sentence and an additional 50 federal years under those conditions so that I could get back in federal custody where I would be safe. On Monday, October 6th, he indicated that the Attorney General had said no, they would not be returning me to Federal Court custody.

As everybody knows on October 17, 1980, which was a Friday, I was convicted in this court of first degree murder in the Bolles homicide.

And on Tuesday, October 28, and again on Wednesday, October 29, consistent with my representations to Mr. Jennings, I testified at a hearing on the Top's Tavern matter without any inducements, without any agreement.

Your Honor, when granted enough immunity, I have never once refused to give evidence or testify when asked. Never. And I contend I have never violated any agreement. Never. I have never lied. Never. Quite to the contrary, Your Honor.

In January of 1977 to date I have proffered (p. 82) hundreds and hundreds of pages of statements consisting of literally thousands and thousands of questions that have been asked of me.

I have now made 14 court appearances to date on five separate cases consisting of approximately 31 days of testimony. These cases have been heard by eight different Judges, three of them Federal Judges and one Federal Magistrate. Of the 81 or so jurors who have heard my testimony all have returned guilty verdicts in each case resulting in seven convictions.

I have been cross-examined under oath for approximately 190 hours by some of the most brilliant legal minds in the country and some most skilled in the art of cross-examining. In all I have been examined and cross-examined and re-examined by 22 different attorneys, ten defense

attorneys the likes of Percy Foreman, John Flynn, Paul Smith, seven state and local prosecutors, five federal prosecutors.

Totally 21 investigators have also examined, reexamined, and cross-examined me, five Alcohol and Tobacco Firearm Agents, two Drug Enforcement Administration Agents, five Federal Bureau of Investigation Agents, five Phoenix Police Department Organized Crime and Intelligence Agents—or Detectives, excuse me, two City of Phoenix bomb experts, and two homicide (p. 83) detectives from a midwest location.

In total, Your Honor, I have cooperated in approximately 205 interrogative sessions which have been conducted to date. Fifty-five of these have been formal face-to-face in-depth question and answer sessions, approximately.

I anticipate testifying in some very serious matters as a nonparticipant in these crimes, no culpability. I anticipate testifying in seven, possibly eight, more murder cases. And plus three additional other matters.

In these four and half years many things have become painfully obvious to me, Your Honor, from my unique position and perspective of both the criminal cases and the various personalities involved.

- 1. The State of Arizona does not want to reward me for any further cooperation by being just and reasonable.
- 2. If I am to tender further cooperation to other law enforcement jurisdictions, the State of Arizona will now see to it that I have been punished for giving that cooperation.

3. By removing me from federal custody, realizing full well the danger to my life and that future specific cooperation and consideration involved in the (p. 84) agreement with the Department of Justice, keeping me in federal protective custody, the State of Arizona would have, under normal circumstances, not only frustrated those prosecutions, but would have stopped them. Stopped them just as surely and as effectively as they have the State prosecutions in the Don Bolles homicide.

Accordingly, Your Honor, I have been in contact with Mr. Ron Jennings, United States Attorney's Office. I have told Mr. Jennings that because of the relationship which has now developed with the Attorney General's—Attorney General's Office, State of Arizona, that should another investigative agency wish to investigate and prosecute the Don Bolles homicide, where the State has let the ball lie presently, they will in fact have my cooperation and truthful testimony whenever required, whenever asked, and whenever provided enough immunity to answer the questions.

Now, having set in both places, both hot spots in a murder trial, both as the government's key witness in many cases, and in a murder trial, and as a defendant. Your Honor, it's much harder up here from not only admitting, but from realizing the unimagined pain, suffering and loss my prior acts have caused in concert with the misery, humiliation and personal hell my testimony required me to re-live and experience time and (p. 85) time again while giving evidence and sworn testimony against once—against one's—against those who were once so very, very close to me is a personal punishment far greater than any court

could impose, for indeed there is no immunity from the most enfeebling of all emotions, regret.

I thank Your Honor for allowing me the opportunity to express myself.

(Defendant leaves stand.)

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JOHN HARVEY ADAMSON.

Petitioner,

No. CIV 80-502 PHX-CAM

VS.

JERRY HILL, Sheriff of Maricopa County, State of Arizona, et al.,

NOTICE OF APPEAL

Respondents.

Petitioner, JOHN HARVEY ADAMSON, by and through his attorneys undersigned, by this Notice hereby appeals from the Court's Order of September 26, 1980 dismissing his Petition for Writ of Habeas Corpus and from the Court's Order of October 21, 1980 denying Petitioner's Motion for Amendment of the Court's Findings, Amendment of the Judgment and vacation of the Order of the Arizona Supreme Court, all in the above-captioned matter.

RESPECTFULLY SUBMITTED this 19th day of November, 1980.

MARTIN & FELDHACKER

/s/ By Gregory H. Martin

/s/ By William H. Feldhacker

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,

No. 80-5941

Petitioner-Appellant,

DC# CV 80-502 M

Arizona (Phoenix)

JERRY HILL, Sheriff of Maricopa

ORDER

County, State of Arizona, et al.,

(Filed

Respondents-Appellees.

April 24, 1981)

Before: TANG and SKOPIL, Circuit Judges

The Court has determined that this case is inappropriate for submission on the basis of pre-argument statements under the Appeals Without Briefs Program. Accordingly, the Court issues the following order:

- (c) the parties' briefs shall address, but shall not be limited to, the following issues:
- (i) What effect, if any, does the recent decision in Sumner v. Mata, 101 S.Ct. 764 (1981), have on federal habeas corpus review of the Arizona Supreme Court's finding that Adamson was required under the plea bargain to testify at the retrial of Dunlap and Robison?
- (ii) What effect, if any, do the provisions of 28 U.S.C. § 2254(d) (2), (3), (6), or (8) have on federal habeas corpus review of the Arizona Supreme Court's finding referred to in question (i), supra?
- (iii) Must the district court hold an evidentiary hearing concerning appellant's duty to testify under the plea bargain in light of appellant's contention that the statements made at his 1978 sentencing regarding a duty to testify at further proceedings related only to the Ashford Plumbing case, rather than the Don Bolles case? (See CT 13, Transcript of May 28, 1980 Arizona Supreme Court hearing at 7-8, CT 4, Exhibit 1; and CT 9 at 5-6);

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-5941

D.C. No. CV 80-502 PHX-CAM

MEMORANDUM

[Caption omitted]

(Filed Nov. 30, 1981)

Appeal from the United States District Court for the District of Arizona

Carl A. Muecke, Chief District Judge, Presiding Argued and Submitted July 13, 1981

Before: ELY and CHOY, Circuit Judges, and PFAEL-ZER,* District Judge.

Appellant Adamson appeals from a district court order dismissing his habeas corpus petition as legally frivolous and from the district court's subsequent denial of his motions to amend the findings and the judgment. We affirm.

I. The Case

Adamson was charged with Open Murder in the June 1976 bombing death of Donald Bolles, a charge permitting a verdict of first degree murder. The prosecution struck a plea-bargaining agreement with him providing inter alia that Adamson would be allowed to plead guilty to the reduced charge of second degree murder and receive a stipulated sentence. Adamson agreed in return to testify

against other individuals under investigation in a number of cases, including his alleged accomplices in the Bolles killing, Max Dunlap and James Robison.

Pursuant to the agreement, Adamson pleaded guilty to second degree murder on January 15, 1977. Adamson cooperated with the prosecution in a number of cases and Robison and Dunlap were convicted of first degree murder in the Bolles case primarily because of his testimony. Although Adamson began to serve time after entering his guilty pleas, he was not formally sentenced until the judgment of guilt was entered on December 7, 1978, nearly two years later.

In early 1980, the convictions of Robison and Dunlap were reversed by the Arizona Supreme Court. The Arizona Attorney General, preparing to reinstitute charges against them, notified Adamson that his testimony would again be required. Adamson, through his counsel, refused to testify unless the state complied with a list of "nonnegotiable" demands, including his release from custody. Adamson claimed that his obligations under the plea agreement ended at the time of his formal sentencing. The state warned Adamson of the consequences of continued recalcitrance, and upon his refusal to cooperate charged him with the original count of first degree murder.

The Arizona Superior Court denied Adamson's motions to strike the renewed charge as barred by the existing judgment. Adamson then filed a Petition for Special Action with the Arizona Supreme Court, alleging that the lower court had abused its discretion in refusing to block

^{*}The Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

the prosecution. The Arizona Supreme Court agreed to hear arguments as to the meaning of the plea agreement despite Adamson's attempt to dismiss the petition when he learned that he could not restrict that court's scope of review.

Following briefing and oral argument, the Arizona Supreme Court concluded that the terms of the plea agreement contemplated a continuing duty on Adamson's part to testify at any retrial made necessary by appellate reversal. The court also ruled that Adamson's breach of his duty to testify constituted a waiver of his right against double jeopardy under the terms of the plea agreement and justified the state's reprosecution. The court vacated Adamson's existing conviction and reinstated the original charge against him.

Adamson then petitioned the federal district court for a writ of habeas corpus, seeking to block the impending state prosecution. He argued that the Arizona Supreme Court had erred in making its double jeopardy ruling and that the state had denied him due process by failing to hold an evidentiary hearing prior to interpreting the plea agreement. After hearing oral argument, the district court dismissed the petition as legally frivolous, agreeing with the Arizona Supreme Court that the provisions of the plea agreement obligated Adamson to testify and that his refusal justified the reprosecution. In an order denying several post-judgment motions by Adamson, the court found that Adamson's counsel had discussed at length the merits of the plea agreement issue before the Arizona Supreme Court and rejected Adamson's request for an evidentiary hearing. Adamson was subsequently tried, convicted of first degree murder and sentenced to death.

II. Analysis

Adamson raises two central arguments on appeal from the district court's order: (1) that the rejection of his double jeopardy argument by both the Arizona Supreme Court and the federal district court rested on erroneous interpretations of the plea agreement; (2) that he was denied due process by the failure of the state courts to hold a full evidentiary hearing to determine the material facts surrounding the breach of the plea agreement.

We turn to the procedural argument because its resolution determines the degree of deference due the state court's findings of fact. A federal statute requires that federal courts entertaining habeas corpus petitions treat state court findings of fact with a presumption of correctness so long as the state proceedings meet certain procedural requirements. 28 U.S.C. § 2254(d). Adamson does not dispute that the Arizona Supreme Court proceeding constituted a "hearing on the merits of a factual issue" as required by the statute. See Sumner v. Mata, 449 U.S. 539, 546 (1981). He argues instead that the state court hearing was procedurally deficient, thus bringing the factual findings within one of the exceptions enumerated in § 2254(d).²

Adamson argues generally that the record on which the Arizona Supreme Court made its decision was inadequate. More specifically, he argues that an evidentiary hearing should have been held to establish "among other things" the context of a colloquy between the sentencing judge and the parties at the time of sentencing.

We disagree that the state proceedings were procedurally inadequate. The Arizona Supreme Court had the

benefit of Adamson's pleadings, oral argument, and a record including inter alia the plea agreement, Adamson's written refusal to testify, and a transcript of the proceedings at Adamson's sentencing. Although Adamson objected to the Supreme Court's consideration of the plea agreement, he was given full opportunity to address the issue and his counsel indeed discussed it at oral argument. He specifically identifies only one issue which would be illuminated by the evidentiary hearing he requests, the meaning of a colloguy between his counsel and the sentencing judge, and that issue is essentially collateral to interpretation of the argreement terms.3 The Supreme Court mentioned the colloquy as evidence rebutting Adamson's interpretation of the plea agreement, but rested its decision upon the provisions of the agreement itself. See Adamson v. Superior Court, 125 Ariz. 579, 582-83, 611 P.2d 932, 935-6 (1980). Even if the colloquy were interpreted as Adamson argues it should be, it would cast no doubt on the accuracy of the decision. We find that Adamson was given a full and fair hearing of his claims in state court and that the statutory presumption of correctness attaches to its findings of fact.

Adamson cannot refute that presumption, although he argues that the Arizona Supreme Court erred on the merits in interpreting the plea agreement. The interpretation reached by both the state court and the federal district court, that the plea agreement did not contemplate renegotiation in the event of a retrial, is eminently reasonable. The same can be said for the significance attributed by both courts to the deferred sentencing provision. The thrust of that provision concerns a waiver of prompt sentencing rights and not a time for termination

of the plea agreement. This interpretation is buttressed by terms of the agreement obligating Adamson to refrain from appealing the conviction or from applying for parele, obligations which were clearly intended to extend beyond the time of sentencing.

In anticipation that this appeal would fail, Adamson suggests that this court allow him to "cure" his breach of the plea agreement by returning him to the status quo prior to his refusal to testify. Compliance with his request would reduce the meaning of the various state and federal decisions in this case to the status of advisory opinions and render meaningless the trial resulting in his murder conviction. In his written refusal to testify and list of demands, Adamson acknowledged that he ran the risk of reprosecution for first degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble.

AFFIRMED.

FOOTNOTES

Paragraph 5 of the plea agreement provides in part that:

Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges will be automatically reinstated. The defendant will be subject to the charge of Open Murder and if found guilty of First Degree Murder to the penalty of death or life imprisonment requiring mandatory twenty-five (25) years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

^{1. [}reference on page 3]

2. [reference on page 4]

Adamson specifically alleges that the state proceedings were defective under 28 U.S.C. § 2254(a)(2), (3), (6) and (8), which provide exceptions to the presumption of correctness where it is established.

- (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;
- (6) that the appliance did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

3. [reference on page 5]

In the colloquy, Adamson's counsel acquiesced in the prosecutor's statement for the record that the opposing counsel had discussed the fact "that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony." Adamson argues that the discussion related only to testimony in a case unrelated to the Bolles case and did not extend to testimony at a retrial.

4. [reference on page 5]

Paragraphs 4 and 5 of the plea agreement provide, in pertinent part, that:

4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested

by proper authorities against any and all parties involved in the murder of Don Bolles, and in the beating of Leslie Boros at the Sheraton-Scottsdale, Maricopa County, Arizona, and any and all parties involved in the crimes listed in Exhibits A and B filed with this Court as part of their agreement this date. . . .

5. It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement.

This shall include all interviews, depositions, hearings and trials. . . .

In interpreting those provisions, the Arizona Supreme Court held:

Although the plea agreement does not specifically spell out the duration of petitioner's obligations, it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hesitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or retrial after reversal.

Adamson v. Superior Court, 125 Ariz. 574, 583; 611 P.2d 932, 936 (1980).

[reference on page 5]

Paragraph 8 of the plea agreement provides:

8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it.

Adamson contends that this provision should be interpreted as indicating that the act of sentencing concluded his obligation to testify.

IN THE UNITED STATES DIISTRICT COURT FOR THE DISTRICT OF ARIZONA

AMENDED SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM IN SUPPORT

[Ricketts habeas]

[Caption Omitted]

(Filed December 14, 1983)

The Petitioner, JOHN HARVEY ADAMSON, by and through his atorney undersigned, submits the following Supplemental Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and for said Supplemental Petition alleges as follows.

T

This Petition is filed pursuant to 28 U.S.C. § 2254, et seq.

II

On June 13, 1976, Petitioner was arrested for the murder of Don Bolles, alleged to have occurred on June 2. 1976, in Phoenix, Arizona.

IX

- . .
- H. Petitioner's sentence of death was imposed arbitrarily and capriciously, in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments, solely because of his initial attempt to obtain additional consideration for testimony at the retrial of his alleged co-conspirators, and despite the fact that the same sentencing judge had agreed to impose and imposed a term of imprisonment for the same crime upon his guilty plea.
- 1. Petitioner initially entered into a plea agreement with the State of Arizona whereby he was permitted to plead guilty and receive a sentence of 48 to 49 years for

this murder, in exchange for his testimony in the prosecution of others allegedly involved in the crime.

- 2. The trial court agreed to the terms of this agreement prior to Petitioner's guilty plea, and imposed a term of imprisonment upon that plea, after Petitioner testified at those trials, which resulted in convictions of others.
- 3. The convictions of Petitioner's alleged co-conspirators were reversed by the Arizona Supreme Court. Following that reversal, Petitioner initially attempted to obtain additional consideration for his testimony at any retrial, which he believed was not contemplated by the initial plea agreement. The prosecution refused Petitioner's offer and filed new charges of first degree murder. The Arizona Supreme Court, without conducting an evidentiary hearing, held the plea agreement was breached and permitted the reinstatement of the charge.
- 4. Prior to his retrial. Petitioner renewed his offer to testify at the co-conspirator's retrial, under the terms of the original plea agreement. The prosecution declined his offer, and the case proceeded to trial. During the trial, and up to the time of sentencing, Petitioner maintained his offer to testify consistent with the original agreement, but the prosecution declined. Petitioner also voluntarily testified in other, related cases, not covered by the plea agreement after his sentence to death.
- 5. Petitioner was sentenced to death by the same trial judge who had previously sentenced him to imprisonment under the plea agreement. The trial judge had approved the agreement, and was aware of the testimony Petitioner gave in consideration of that agreement, which was never admitted into the record of this case.

6. The Prosecution in this case sought Petitioner's death sentence for reasons other than the strength of the evidence against him and the seriousness of his crime. The trial court imposed the increased sentence without finding that Petitioner had engaged in any subsequent acts of misconduct after the first sentencing.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION FOR APPOINTMENT OF ADDITIONAL COUNSEL FOR PETITIONER

[Ricketts habeas]

[Caption Omitted]

(Filed December 8, 1983)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney undersigned hereby moves this court for an order that additional counsel be appointed to assist counsel undersigned for the following reasons.

Counsel undersigned is now a sole practioner [sic] devoting his time exclusively to the defense of criminal defendants. Counsel has a contract with Maricopa County to provide representation to indigents charged with crimes in the County Justice and Superior Courts. Because of this, counsel's caseload is extensive, and in order to afford Petitioner the representation needed and to which he is er "tled, additional counsel is needed.

Additionally, Petitioner has included in his petition the allegation that he was sentenced arbitrarily and capriciously to death after having been first sentenced to imprisonment on a reduced charge in exchange for his cooperation. After Petitioner's plea agreement was declared null and void and the original charge of murder was reinstated, Petitioner agreed to testify in this matter as well as others in exchange for his plea agreement. At sentence, Petitioner voiced this intention again and has, in fact, since the imposition of death cooperated with law enforcement in the investigation and prosecution of individuals involved in serious criminal activity. Counsel

undersigned as well as William Schafer are material witnesses in connection with this allegation. Petitioner has requested an evidentiary hearing on this claim and if granted additional counsel will be needed to present Petitioner's position.

For the reasons stated herein, Petitioner respectfully requests that additional counsel be appointed for him in the above-captioned matter.

DATED this 7th day of December, 1983.

MARTIN & FELDHACKER
/s/ Gregory H. Martin

IN THE UNITED STATES DISRICT COURT FOR THE DISTRICT OF ARIZONA

PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING

[Ricketts habeas]
[Caption omitted]

(Filed December 29, 1983)

Petitioner, JOHN HARVEY ADAMSON, by and through his attorney undersigned, hereby moves this Court for an evidentiary hearing on claims IX-H and IX-I pursuant to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts and 28 U.S.C. § 2254(d).

DATED this 29th day of December, 1983.

MARTIN & FELDHACKER
By: Gregory H. Martin

MEMORANDUM .

Petitioner, in claim IX-H has raised the argument that his death sentence was imposed arbitrarily and capriciously, in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments, because of his initial attempt to obtain additional consideration for testimony at the retrial of his alleged con-conspirators, and despite the fact that the same sentencing judge had agreed to impose and did impose a term of imprisonment for the same conduct upon his guilty plea.

Petitioner submits that evidence must be taken in connection with the events that transpired after Petitioner's plea agreement was declared null and void by the Arizona Supreme Court on May 28, 1980, and after this Court upheld the Arizona Supreme Court's ruling on September 26, 1980, in Adamson v. Hill, No. CIV 80-502-PHX-CAM. Petitioner has heretofore requested that this Court consider the file in No. CIV 80-502-PHX-CAM when disposing of this issue. However, additional evidence must be adduced regarding the negotiations by the parties after May 28, but before September 26, 1980, and, then, after September 26, through the time when Petitioner was sentenced to death. As has been set forth, evidence will show that the State of Arizona wished to obtain the testimony of the Petitioner in exchange for a reduced charge. Petitioner argues that his ultimate death sentence in light of the State's willingness to bargain for his life constitutes an arbitrary and capricious application of the death penalty and therefore is unconstitutional.

Further, because counsel undersigned is a potential witness with respect to the claim the Court should grant his previously filed motion for appointment of counsel.

Petitioner, in claim IX-I, has raised the argument that his death sentence was unconstitutionally imposed and upheld by virtue of the fact that the Arizona Supreme Court, when it conducted its proportionality review, did not consider cases wherein a life sentence was imposed. The court only compared the instant case to other cases where the death sentence was imposed and did not review, what Petitioner views as equally important, those cases where life was the sentence as opposed to death. Petitioner requests that this Court set a time and date for an evidentiary hearing in order that Petitioner may

adduce evidence at such hearing in connection with those cases where a life sentence was imposed, thereby showing the disproportionality of the sentence given here compared to all murder cases, and therefore its unconstitutionality.

Ever since the Federal Habeas Corpus Act of 1867 was passed, the federal courts have had the power and the responsibility in habeas corpus proceedings to "hear and determine the facts, dispose of the matter as law and justice require." Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385-86. See *Townsend v. Sain*, 372 U.S. 293, 311 (1962). This authority and responsibility are currently codified in 28 U.S.C. § 2243 and 2254(d), as well as in Rule 8 of the Rules Governing § 2254 Cases.

Moreover, the Supreme Court has continually and frequently held that the federal judiciary is required to make an independent determination of any factual dispute material to a federal issue appropriately raised in a federal habeas corpus petition — and that such a determination requires an evidentiary hearing in most cases in which the facts are in dispute. E.g., Jackson v. Virginia, 443 U.S. 307, 318 (1979); Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Townsend v. Sain, 372 U.S. 293, 312 (1963); Brown v. Allen, 344 U.S. 443, 462 (1953). Cf. Blackledge v. Allison, 431 U.S. 63 (1977); Machbroda [sic] v. United States, 368 U.S. 487, 495 (1962); Pennsylvania ex.rel. Herman v. Claudy, 350 U.S. 116, 120-21 (1956). As the Court held in Townsend v. Sain, supra, "where an applicant for a writ of Habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew", for "the opportunity for redress, which

presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed". *Townsend* citing *Frank v. Mangum*, 237 U.S. 309, 345-50 (1915) (Holmes, J., dissenting).

The Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson v. North Carilina [sic], 428 U.S. 280, 305, 1976. This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, sentence, and appeal:

"the defendant has a legitimate interest in the character of the procedure which leads to the imposition of the sentence of death even if he may have no right to object to a particular result of the sentencing process". Gardner v Florida, 430 U.S. 349, 358 (1977).

See Beck v. Alabama, 447 U.S. 625, 637-38 (1980); and Eddings v. Oklahoma, 102 S.Ct. 869, 877 (1982) (O'Connor, J., concurring); and Lockett v. Ohio, 438 U.S. 586, 604 (1978). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair state and federal post-conviction proceedings. E.g., Shaw v. Martin, 613 F.2d. 487, 491 (4th Cir., 1980) (Phillips, single Circuit J.), relying on Evans v. Bennett, 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice).

Because evidentiary hearings in federal habeas corpus proceedings, as well as in other situations, have consistently been recognized as important means of assuring the reliability of judicial determinations, Woodson v. North Carolina, supra, and its progeny make it particularly important in capital cases, such as the present one, that an evidentiary hearing be held whenever it may shed any light on the fairness of the procedures leading to, or the constitutional validity of, a sentence of death. In short, if the possibility of "detention [that] violates the fundamental liberties of the person", typically requires federal habeas corpus hearing, Townsend v. Sain, supra, at 312, the possibility of execution under such circumstances should provide all the more reason for holding such a hearing. For "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two". Woodson v. North Carolina, supra, at 305.

For the reasons stated herein, it is respectfully requested that the Court provide a time and date for an evidentiary hearing on those matters discussed herein.

DATED this 29th day of December, 1983.

MARTIN & FELDHACKER
/s/ by Gregory H. Martin

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON.

Petitioner-Appellant,

No. 84-2069

V.

JAMES G. RICKETTS, et. al.,

ORDER

Respondent-Appellee.

(Filed July 12, 1985)

Before: KENNEDY, HUG, SCHROEDER, PREGER-SON, ALARCON, FERGUSON, NELSON, BO-OCHEVER, NORRIS, BEEZER, and BRU-NETTI, Circuit Judges.

Oral argument in the above case shall be held in San Francisco on Tuesday, September 17, 1985 at 10:00 a.m.

The parties shall submit supplemental briefs of no more than thirty pages including a discussion of the following issues:

- (1) Whether the double jeopardy clause barred Adamson's conviction and sentence of death following his conviction and sentence pursuant to the plea agreement;
- (2) Whether the application of the death penalty to Adamson was arbitrary on the grounds that the State sought it and the sentencing judge imposed it vindictively.

Appellant's brief is due August 2, 1985; the appellee's brief is due August 23, 1985. The parties shall also file 18 additional copies of their original briefs and excerpts of record by August 23, 1985.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EN BANC

No. 84-2069

JOHN HARVEY ADAMSON,

Petitioner/Appellant,

V.

JAMES G. RICKETTS, et al.,

Respondent/Appellee.

PETITIONER'S MOTION TO AUGMENT THE RECORD

Pursuant to Federal Rules of Appellate Procedure Rule 27(b) and Rule 10(e), Petitioner John Harvey Adamson moves this Court to augment the record in this case with the following documents: The District Court Record in the proceeding John Harvey Adamson v. Jerry Hill, et al., Ninth Circuit Court of Appeals No. 80-5941; United States District Court for the District of Arizona No. CV 80-502.

By its Order of July 12, 1985, the Court has required the parties to further brief the issues in this case, including

whether the double jeopardy clause barred Adamson's conviction and sentence of death following his conviction and sentence pursuant to the plea agreement.

Some of the record documents relevant to this issue are contained in the record of Adamson v. Hill, where the same question was raised.

The same District Court Judge who ruled on the Petition in this case presided at the earlier habeas corpus

proceeding in Adamson v. Hill. Petitioner's arguments in this case referred the District Court to the documents in the Adamson v. Hill record. See Petitioner's Supplemental Brief on Rehearing En Banc at 6 n.3, 14 n.8. So that this Court will have the same documentation before it in deciding this issue en banc, Petitioner believes that the record here should be augmented with the Adamson v. Hill record from the District Court.

Respondent's counsel has indicated that he has no objection to augmentation of the record with these documents. See Affidavit of Timothy K. Ford attached hereto. Such augmentation would prejudice neither party and would facilitate a full review of all issues in this case by the Court en banc. Petitioner has included with this Motion a certified copy of the entire Adamson v. Hill Clerk's Record, to facilitate the process of augmentation, if the Court allows it.

DATED this 19th day of August, 1985.

Respectfully submitted,
/s/ Timothy K. Ford
Attorney for Petitioner

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN HARVEY ADAMSON,

Petitioner-Appellant,

VS.

JAMES G. RICKETTS, Director, Arizona Department of Corrections; and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Respondents-Appellees.

ORDER

(Filed August 30, 1985)

Before: KENNEDY, HUG, SCHROEDER, PREGER-SON, ALARCON, FERGUSON, NELSON, BOOCHEVER, NORRIS, BEEZER, and BRUNETTI, Circuit Judges.

Petitioner's motion to augment the record is GRANTED.

John Harvey ADAMSON,

Petitioner-Appellant,

v.

James G. RICKETTS, Director, Arizona Department of Corrections, et al., Respondents-Appellees.

No. 84-2069.

United States Court of Appeals, Ninth Circuit.

Argued En Banc and Submitted

Sept. 17, 1985

Decided May 9, 1986.

Before KENNEDY, HUG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON, BOOCHEVER, NORRIS, BEEZER, and BRUNETTI, Circuit Judges.

FERGUSON, Circuit Judge:

Petitioner filed a petition for a writ of habeas corpus in the District Court of Arizona after exhausting all his state remedies. He contends that his conviction for first degree murder and death sentence violated various provisions of the federal Constitution. The district court denied his petition, and a panel of this court affirmed that denial, Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). That decision was vacated when the majority of the judges of the circuit voted to have the appeal determined by an enbanc panel. We reverse the district court and direct the issuance of a writ of habeas corpus.

I.

Petitioner Adamson was arrested and charged with the 1976 car bombing murder of Don Bolles, an investigative reporter in Arizona. In January 1977 Adamson and the state entered into a plea agreement¹ under which Adamson would testify against two other individuals and plead guilty to second degree murder. In exchange, Adamson would receive a sentence of 48-49 years imprisonment, with actual incarceration time to be 20 years, 2 months.

On January 15, 1977, Superior Court Judge Ben Birdsall reviewed the plea agreement, but conditioned his acceptance of its provisions until he determined the appropriateness of the sentence. Four days later, Judge Birdsall found the sentence appropriate and accepted the guilty plea and plea agreement provisions.

After the court's acceptance of the plea agreement, for the next three years Adamson cooperated with authorities. On the basis of Adamson's testimony, Max Dunlap and James Robison were convicted of the first degree murder of Bolles. While the Dunlap and Robison convictions were pending on appeal, the state moved to have Adamson's sentence imposed. Judge Birdsall sentenced Adamson to the agreed term of 48-49 years on December 7, 1978.

On February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison and remanded the cases for new trials. State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980); State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980). When the state sought to secure Adamson's testimony in the retrials, Adamson's lawyer

The text of the plea agreement appears in Appendix A.

stated that his client believed that the plea agreement terminated his obligations once he was sentenced. He further stated that Adamson requested additional consideration, including release, in exchange for his testimony at the retrials.² The state, in a letter to Adamson's attorneys dated April 9, 1980, stated that it considered Adamson to have breached the plea agreement by refusing to testify and that Adamson would be prosecuted for first degree murder.³

A few days later, the state called Adamson as a witness at a pretrial hearing in the Dunlap and Robison retrials. Adamson re-confirmed his previous testimony concerning the Bolles killing but asserted a Fifth Amendment privilege when questioned about another crime. After examining the state's letter of April 9, 1980, Superior Court Judge Robert L. Myers denied the state's motion to compel Adamson to testify. Judge Myers concluded that Adamson could legitimately assert his Fifth Amendment rights unless the state granted him immunity from prosecution. Although the state sought review of Judge Myers' denial of the motion to compel Adamson to testify, the Arizona Supreme Court

declined to accept jurisdiction of the Special Action Petition. *Adamson v. Superior Court*, 125 Ariz. 579, 582, 611 P.2d 932, 935 (1980) (en banc).

The state filed a new information charging Adamson with first degree murder, id., which he challenged by a Special Action in the Arizona Supreme Court, id. at 579, 611 P.2d at 933. The court held that Adamson, by refusing to testify, breached the plea agreement and that he waived the defense of double jeopardy. Id. at 584, 611 P.2d at 937. The court vacated Adamson's second degree murder sentence, judgment of conviction, and guilty plea, and reinstated the open murder charge. Following that decision, Adamson offered to accept the state's interpretation of the agreement and to testify against Dunlap and Robison. The state refused Adamson's offer and proceeded with the charge of first degree murder.

Adamson unsuccessfully sought federal habeas corpus review pursuant to 28 U.S.C. § 2254, and this court affirmed in an unpublished memorandum disposition the district court's denial of the petition. Adamson v. Hill, 667 F.2d 1030 (9th Cir.1981). On October 17, 1980, Adamson was convicted of first degree murder. At sentencing, in accordance with the Arizona statute, Ariz.Rev.Stat.Ann. § 13-703(C), Judge Birdsall concluded that two aggravating circumstances—(1) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value, and (2) the defendant committed the offense in an especially heinous, cruel or depraved manner—were present to invoke a death sentence. The Arizona Supreme Court affirmed. State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 464 U.S. 865, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983). The petitioner then instituted the present federal habeas corpus proceeding.

^{2.} The letter sent by Adamson's attorney included the following terms for Adamson's future testimony: (1) release from custody after testifying; (2) to be held in a non-jail facility with full-time protection during the retrials; (3) a complete set of clothing; (4) protection for his exwife and son; (5) an educational fund for his son; (6) transportation and funds for establishing a new identity outside of Arizona; and (7) full and complete immunity for all crimes in which he may have been involved, stipulating that none were murders. The full text of the letter is contained in Appendix B.

The text of the state's letter is contained in Appendix C.

The issues before this court are (1) whether the admission of certain evidence at trial violated the Confrontation Clause; (2) whether the Arizona statute denied the petitioner's right to a jury trial by permitting judicial factfinding to determine eligibility for a death sentence; (3) whether the Arizona statute's aggravating factor of heinous, cruel or depraved manner is unconstitutionally vague; (4) whether the imposition of a death sentence following Adamson's assertion of his Fifth Amendment rights constitutes prosecutorial or judicial vindictiveness;4 (5) whether the Arizona statute violate the Eighth Amendment by requiring a death sentence if aggravating circumstances are present; and (6) whether prosecution for first degree murder after Adamson's guilty plea and conviction for second degree murder violated the prohibition against double jeopardy. Because the state's actions violated the Double Jeopardy Clause, we do not discuss or decide the validity of the remaining issues.

II.

The Double Jeopardy Clause, which applies to state proceedings, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The clause incorporates three separate guarantees: "It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same of-

fense after conviction, and against multiple punishments for the same offense." Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 306-07, 104 S.Ct. 1805, 1812-13, 80 L.Ed.2d 311 (1984) (citing Illinois v. Vitale, 447 U.S. 410, 415, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 228 (1980)); see United States v. Brooklier, 637 F.2d 620, 621 (9th Cir.), cert. denied, 450 U.S. 980, 101 S.Ct. 1514, 67 L.Ed.2d 815 (1980).

Implicit in the prohibition against prosecution for the same offense following conviction is the "constitutional policy of finality for the defendant's benefit." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion); see also United States v. Scott, 437 U.S. 82, 92, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 (1978) ("primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment"). Without this respect for finality, prosecutors, equipped with substantially greater resources than most individuals, would be permitted and encouraged to reprosecute defendants when the result was any sentence short of the maximum penalty. See United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976) ("Underlying this constitutional safeguard is the belief that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.") (quoting Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24, 2 L.Ed.2d 199 (1957)).

^{4.} The dissenting opinion contends that in this case there was no prosecutorial or judicial vindictiveness. As we have declined to address the validity of that issue, we express no opinion about the position taken by the dissent.

For a defendant to invoke the double jeopardy bar against a subsequent prosecution, jeopardy must have attached to the first prosecution. When the defendant forgoes the right to have guilt determined by the trier of fact and instead pleads guilty to the charged offense, under some circumstances jeopardy attaches when the judge accepts the plea. See, e.g., United States v. Vaughan, 715 F.2d 1373, 1378 n.2 (9th Cir.1983); United States v. Bullock, 57 F.2d 1116, 1118 (8th Cir.), cert. denied, 439 U.S. 967, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978).

Here it appears that the plea was accepted subject to certain conditions. We need not decide whether jeopardy attached upon such an acceptance, see United States v. Cruz, 709 F.2d 111, 114-15 (1st Cir.1983) because, in any event, jeopardy attached to the prosecution for second degree murder when Judge Birdsall entered a judgment of conviction and sentenced Adamson on December 7, 1978.

Double jeopardy prohibits multiple prosecutions for the same offense. As a general rule, a conviction for a lesser-included offense bars the subsequent prosecution for the greater offense. Illinois v. Vitale, 447 U.S. 410, 419-21, 100 S.Ct. 2260, 2266-68, 65 L.Ed.2d 228 (1980); United States v. Stearns, 707 F.2d 391, 393 (9th Cir.1983), cert. denied, 464 U.S. 1047, 104 S.Ct. 720, 79 L.Ed.2d 181 (1984). The Supreme Court. in Brown v. Ohio, 432 U.S. 161, 168, 97 S.Ct. 2221, 2226-27, 53 L.Ed.2d 187 (1977), determined that a conviction for joyriding barred the subsequent prosecution for the greater offense of auto theft because the "greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." See also Garrett v. United States,

— U.S. —, 105 S.Ct. 2407, 2416, 85 L.Ed.2d 764 (1985) (Brown defendant "engaged in a single course of conduct"). To analyze this issue we must determine whether each offense "requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.2d 306 (1932); see also Vitale, 447 U.S. at 416-17, 100 S.Ct. at 2265-66.

The state argues that Adamson was not subject to double jeopardy because his first conviction was for second degree murder and his second conviction was for first degree murder. If accepted, this reasoning would vitiate any protection guaranteed by the Double Jeopardy Clause. As with Brown, Adamson's second degree murder conviction was a lesser-included offense of first degree murder. A conviction for second degree murder requires no fact that is not also needed to sustain a first degree murder conviction. Furthermore, the State of Arizona even recognizes this relationship by classifying the two types of murder as different degrees of the same crime. See Ariz. Rev.Stat.Ann. § 13-452, repealed by Laws 1977, ch. 142, § 15, effective October 1, 1978. Thus, Adamson's double jeopardy rights were violated by the subsequent prosecution for first degree murder.

III.

The Arizona Supreme Court agreed that jeopardy attached to the second degree murder prosecution, Adamson v. Superior Court, 125 Ariz. 579, 584, 611 P.2d 932, 937 (1980), but it vacated Adamson's conviction and sentence because it believed that he had waived his double jeopardy rights by the plea agreement. We need not resolve whether a defendant may waive double jeopardy rights in the

same manner as other constitutional rights because we conclude that, even if double jeopardy protection is waivable, it was not waived in this case.

"'[Clourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and ... 'do not presume acquiescence in the loss of fundamentotal rights." "Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (quoting Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811-12, 81 L.Ed. 1177 (1937), and Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307, 57 S.Ct. 724, 731-32, 81 L.Ed. 1093 (1937)). Before finding that a defendant has waived a right, a court must be convinced that there was "'an intentional relinquishment or abandonment of a known right or privilege." United States v. Anderson, 514 F.2d 583, 586 (7th Cir.1975) (quoting Zerbst, 304 U.S. at 464, 58 S.Ct. at 1023). In situations involving other constitutional rights, we have required a finding that the defendant's waiver was "made voluntarily, knowingly and intelligently." United States v. Cochran, 770 F.2d 850, 851 (9th Cir.1985) (waiver of right to jury trial). Furthermore, given the importance of the right, such waiver must be made expressly, rather than implied by conduct. Cf. Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed. 2d 195 (1975) (per curiam) (will not imply waiver of double jeopardy rights from guilty plea in second prosecution); Launius v. United States, 575 F.2d 770 (9th Cir. 1978).

The state maintains that Adamson waived the double jeopardy protection when he signed the agreement. It urges this court to adopt the Arizona Supreme Court's conclusion that the plea agreement "by its very terms

waives double jeopardy if . . . [it] is violated." Adamson v. Superior Court of Arizona, 125 Ariz. 579, 584, 611 P.2d 932, 937 (1980). To support this conclusion, the state argues that Adamson impliedly waived his double jeopardy

5. The Arizona Supreme Court relied on the text of the agreement and a statement by Adamson's attorney at the time of sentencing in which Adamson's attorney acknowledged that his client understood that he might have to testify at a future proceeding. The dissent likewise relies on the attorney's statement as evidence that Adamson knew that his obligations continued after sentencing.

The uncontroverted explanation of this "understanding" is that it involved a wholly separate prosecution. Simply because Adamson might have modified his obligations under the plea agreement to include testifying in the Ashford Plumbing Co. trial after his sentencing, this modification cannot be used as "evidence" that he knew he had to testify further against Dunlap and Robison. Moreover, even if the reference were to the possible Dunlap and Robison retrials, an attorney's actions cannot constitute a waiver of his or her client's protection against double jeopardy. See United States v. Rich, 589 F.2d 1025, 1032 (10th Cir.1978) ("Inasmuch as this right is anchored to the United States Constitution, it cannot be waived by one other then [sic] the accused.").

The Arizona Supreme Court's finding of a waiver does not preclude this court's own inquiry into that issue. Whether Adamson's actions constituted a waiver of a constitutional right is determined by federal law. Gladden v. Unsworth, 396 F.2d 373, 376 (9th Cir.1968). In a habeas review a federal court must presume the correctness of a state appellate court's finding of fact unless one of the seven circumstances provided for in 28 U.S.C. § 2254(d) is present or if the state court finding of fact is not fairly supported by the record and the federal court provides a written explanation for its conclusion. Sumner v. Mata, 455 U.S. 591, 592-93, 102 S.Ct. 1303, 1304-05, 71 L.Ed.2d 480 (1982) (per curiam).

Section 2254(d), however, applies only to questions of "'basic, primary, or historical fac[t].'" Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80

(Continued on following page)

claim by accepting paragraphs five and fifteen of the plea agreement. Paragraph five outlines Adamson's obligation to testify and provides that if he refused, "this entire agreement is null and void and the original charges will be automatically reinstated." Paragraph fifteen provides that if "this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement."

The state's contention that these paragraphs constitute a knowing waiver of double jeopardy is without merit. It may well be argued that the only manner in which Adamson could have made an intentional relinquishment of a known double jeopardy right would be by waiver "spread on the record" of the court after an adequate explanation. See Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1968). Even if we were to permit a waiver by implication, the more reasonable interpretation of the

(Continued from previous page)

L.Ed.2d 674 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963)). When the issue includes a mixed question of law and fact or questions of law, setcion 2254(d) does not require giving a presumption of correctness to the state court's findings. See Fendler v. Goldsmith, 728 F.2d 1181, 1190 n. 21 (9th Cir. 1984).

This case presents a mixed question of law and facts. Section 2254(d) applies to "historical" facts, such as whether Adamson signed the agreement, but it does not apply to whether his actions constituted waiver of double jeopardy. See Sumner v. Mata, 455 U.S. at 597, 102 S.Ct. at 1306-07 (questions of fact governed by section 2254(d), but reviewing court may accord "different weight to the facts"); Fendler v. Goldsmith, 728 F.2d at 1190 n. 21. Cf. Miller v. Fenton, — U.S. —, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) ("voluntariness of a confession is a matter for independent federal determination").

agreement is that double jeopardy was not waived. The agreement contains several express waivers of constitutional rights, including the right to a jury trial, to confront and cross-examine witnesses against him, to present a defense, to have appointed counsel, to remain silent, and to be presumed innocent until proved guilty beyond a reasonable doubt. Although each of these waivers is specified in the agreement, double jeopardy is not mentioned. Furthermore, when reviewing the plea agreement, Judge Birdsall questioned Adamson at length about his waiver of the constitutional rights enumerated in the document, but did not inquire about any waiver of double jeopardy claims.

The plea agreement provides in paragraph five that "should the defendant refuse to testify . . . then this entire agreement is null and void and the original charges will be automatically reinstated." Nothing in the agreement specifies that Adamson waived any defenses he had to those charges, including the constitutional defense of double jeopardy. Agreeing that charges may be reinstituted under certain circumstances is not equivalent to agreeing that if they are reinstituted a double jeopardy defense is waived. No evidence has been presented that suggests Adamson knew he was waiving his double jeopardy defense to the reinstituted charge. The plain language of the plea agreement merely provided that under certain circumstances the charges could be reinstituted.

Even if we assume, as the state contends, that the plea agreement contained an implied waiver of double jeopardy rights, the most that could be found implied in the plea agreement is that if Adamson did, or refused to do, something in the future, his action or inaction would constitute a waiver of his double jeopardy rights. But to meet the test

of a knowing, intentional waiver there would have to be an action or inaction that Adamson knew would constitute a waiver. Simple contractual principles are ill-suited to determine whether there has been a waiver of a vital constitutional right. The state argues, in effect, that Adamson entered into a contract, and that implied in that contract was a provision that if it was ultimately determined that Adamson breached the contract, even though he did so unknowingly, the effect of the breach would be to waive his double jeopardy rights. Although unintentional breaches of contract can form the basis for damages in civil contract litigation, such principles are inappropriate to determine whether a defendant in a criminal action has knowingly and intentionally waived a constitutional right.

To constitute a knowing and intentional waiver of double jeopardy rights based on the breach of a plea agreement, the defendant's action constituting the breach must be taken with the knowledge that in so doing we waives his double jeopardy rights. Adamson's obligation to testify under the terms of the plea agreement was not clear and was reasonably subject to the interpretation that he and his attorney advanced. When there was a reasonable dispute as to Adamson's obligation to testify, there could be no knowing or intentional waiver until his obligation to testify was announced by the court. In this case, the superior court had upheld his refusal to testify and it was not until the Arizona Supreme Court ruling in Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932 (1980), that it was judically determined that he was obligated under the plea agreement to testify. Immediately thereafter, Adamson agreed to do so.

Adamson reasonably believed that a refusal to testify did not constitute a breach of the agreement. The only unambiguous language in the agreement referring to when his obligation to testify terminated appears in paragraph eight. That paragraph provides that sentencing would occur "at the conclusion of his testimony in all of the cases." Logic and common sense support Adamson's position that when the state moved for sentencing, it acknowledged that his obligation to provide further testimony ended. The other provisions of the agreement support this interpretation. The state explicitly provided for two obligations that would continue past sentencing—Adamson's waiver of early parole and his waiver of an appeal. The obligation to testify could quite reasonably be interpreted to terminate at the time of sentencing.

Even if Adamson was obligated to testify after sentencing, it was reasonable for him to believe that his assertion of his Fifth Amendment rights at the Robison and Dunlap pretrial hearings did not violate the agreement. At oral argument, the state admitted that Adamson's attorney's letter listing the additional demands in exchange for his testimony was not a breach of the agreement. Rather, it was Adamson's assertion of his interpretation of the agreement. Adamson's refusal to testify at the Dunlap and Robison pretrial hearings was in direct response to the state's letter purporting to withdraw the protection of the plea agreement. It was reasonable for him to believe that the state's position vitiated his obligation to testify. Furthermore, Judge Myers upheld the validity of his Fifth Amendment assertion, and the Arizona Supreme Court refused to hear the state's appeal:

We fail to see how advancing one's interpretation of a plea agreement without more constitutes a knowing and voluntary waiver of double jeopardy. A defendant has the right to assert a reasonable construction of an agreement that differs from the state's interpretation. Otherwise, prosecutors would force defendants into accepting their interpretation. Adamson's position is a reasonable reading of the agreement. The defendant, faced with the state's letter asserting that he was no longer protected from prosecution, could hardly be expected to forgo the constitutional protection against self-incrimination, especially when the Arizona Supreme Court refused to reverse Judge Myers' decision.

Although the Arizona Supreme Court may have correctly decided under state law that Adamson breached the agreement, its vacation of the conviction and sentence did not remove the jeopardy that attached at Adamson's prior sentencing. The court relied on paragraph five's provision that Adamson's failure to testify would nullify the agreement. By its express provisions, this clause could only result in voiding the executory agreement; it has no effect on the judgment of conviction and sentence.

The state argues that this literal interpretation of the plea agreement would make the bargain illusory. Such a claim ignores available options to ensure performance. Competent drafting of the agreement was certainly a method available to the state. The agreement could have addressed the waiver issue, specifically, whether a double jeopardy defense to a reinstated charge of first degree murder would be waived and what actions of Adamson would bring about the waiver. Even absent sufficient foresight and adequate drafting, the state would have avoided the

entire problem by waiting until the Dunlap and Robison prosecutions were completed before having Adamson sentenced. The state offered no reason why Adamson had to be sentenced in December 1978. In fact, there was none. Both parties had waived the time for sentencing in paragraph eight. Finally, the state could have called Adamson to testify after he agreed to do so. The state claims this last option was inadequate because Adamson's credibility was diminished after his attorney submitted the list of additional requests. We are unpersuaded that a confessed murderer who has agreed to testify in return for a lesser punishment would have less credibility because his attorney made additional demands which were rejected by the state.

We conclude that jeopardy attached to the conviction for second degree murder and that Adamson did not knowingly and intelligently waive his double jeopardy protections.⁶

^{6.} The dissent places great reliance on Jeffers v. United States, 432 U.S. 137, 153, 97 S.Ct. 2207, 2217-18, 53 L.Ed.2d 168 (1977), to dispose of Adamson's double jeopardy claims. At 729. Such reliance is misplaced. The Supreme Court in Jeffers held that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." 432 U.S. at 152, 97 S.Ct. at 2217.

Adamson, unlike Jeffers, never elected to have two offenses set forth in two separate indictments tried separately, nor did he persuade the trial court to honor his election, nor were there in fact two indictments and two trials. The Jeffers exception to Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is inapplicable to the facts of this case.

IV.

The district court is directed to issue a writ of habeas corpus freeing the petitioner from the sentence and servitude of his conviction of first degree murder and the imposition of the death sentence.

The granting of the writ will not impair in any degree the conviction and sentence of the petitioner for the second degree murder based upon his plea agreement. The petitioner does not assert any invalidity in that sentence, and indeed he cannot as his claim of double jeopardy is based upon the fact that the second degree murder conviction is valid and enforceable. See State v. Shaw, 646 S.W.2d 52 (Mo.1983) (validity of first conviction unaffected by prohibiting second prosecution); cf. Morris v. Mathews, — U.S.—, 106 S.Ct. 1032, 1038-39, 89 L.Ed.2d 187 (1986) (appellate court permitted to reduce jeopardy-barred conviction to lesser-included offense that is not jeopardy-barred). Without such a valid conviction, there could be nothing upon which double jeopardy attaches.

The judgment of the district court denying the petition for writ of habeas corpus is reversed. The district court is directed to issue a writ of habeas corpus that frees the petitioner from the death penalty. The writ shall further provide for release of the defendant from all restraint caused by his conviction of first degree murder unless the Arizona Supreme Court, on or before six months from the date of the mandate in this appeal, reinstates the conviction for second degree murder that it previously vacated. See Morris v. Mathews, 106 S.Ct. at 1038-39.

REVERSED AND REMANDED.

APPENDIX A

Terms of Plea Agreement

- 1. The defendant, John Harvey Adamson, hereby agrees to plea guilty to Murder, Second Degree.
- 2. The statutory range of sentence for Murder, Second Degree, is probation if no sentence is imposed and ten (10) years to life if sentence is imposed.
- 3. The parties agree that the defendant shall receive a sentence of forty-eight (48) to forty-nine (49) years to date from June 13, 1976. The parties agree that the defendant shall be incarcerated for a total of twenty (20) calendar years and two (2) calendar months and that the sentence (48-49 years) when computed with statutory credits will not permit the defendant to complete the service of the maximum sentence of forty-nine (49) years until twenty (20) calendar years and two (2) calendar months have been passed. It is also agreed that the defendant will be incarcerated for no longer than twenty (20) years and two (2) months. Further the parties agree that the defendant will not apply for or be eligible for parole until twenty (20) calendar years and two (2) calendar months have passed. If the defendant applies for parole, the defendant agrees that this agreement is null and void and the original charges are reinstated automatically. The parties also agree that if for any reason the statutory time credits the defendant earns while incarcerated are taken away from him through no fault of his, including time spent in protective custody, whether requested by the defendant or ordered by the authorities, the sentencing Court will recompute the length of the sentence so that the defendant will not be incarcerated for any period

longer than twenty (20) calendar years and two (2) calendar months.

- 4. The defendant hereby agrees to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles, and in the beating of Leslie Boros at the Sheraton-Scottsdale, Maricopa County, Arizona, and any and all parties involved in the crimes listed in Exhibits A and B filed with this Court as part of their agreement this date. The contents of the crimes and persons listed in Exhibits A and B shall remain sealed from public view until all of the individuals listed therein have been taken into custody or have had charges filed against them or until the State requests that the contents be made public.
- 5. Is is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

- 6. The parties agree that the State will not prosecute the defendant for the following crimes: those he will testify to which are mentioned in this agreement and listed in Exhibits A and B, which are a part of this agreement; those where the defendant's involvement is presently known to the police and the subject of police reports; those which are material to the direct testimony of the defendant in relation to the crimes listed in this agreement and Exhibits A and B; those crimes which the defendant has revealed to the State in transcribed statements and those presently filed and now pending against the defendant. The pending cases against the defendant in the Maricopa County Superior Court will be dismissed with prejudice at the time of sentencing. The defendant is to be severed in those cases from any other defendants.
- 7. The parties agree that the defendant will not testify to any of the matters referred to in this agreement until Judge Birdsall has accepted all the terms and conditions of this agreement.
- 8. All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at the conclusion of his testimony in all of the cases referred to in this agreement and Exhibits A and B, which accompany it.
- 9. The parties agree that in case of the resignation, death or incapacitating illness of the Judge assigned to this case, any Superior Court Judge assigned for that purpose by the Presiding Judge of Maricopa County may sentence the defendant in accordance with the terms of this agreement and is thereby bound by the terms of this agreement.

- 10. All parties agree that the sentencing of the defendant may be in any courthouse in any county seat or any other place designated by the sentencing Judge in the State of Arizona in accordance with Arizona Rules of Criminal Procedure and A.R.S. Sec. 12-130(C).
- 11. The parties agree that the defendant will not appeal from the judgment and sentence entered herein except as may be necessary to recompute his sentence to insure that he be incarcerated not longer than twenty (20) calendar years and two (2) calendar months. If the defendant appeals from this plea agreement except as noted herein, this plea agreement shall be null and void, and all original charges are automatically reinstated.
- 12. It is understood by all parties at this time, and at all times in the past, that the only party with full authority to enter into any plea negotiations with the defendant herein has been William J. Schafer, III, of the office of the Arizona Attorney General, and that any offers alleged to have been tendered by any member of the office of the Maricopa County Attorney and specifically Donald W. Harris, were made without authority. It is specifically denied by counsel for the defendant that Donald W. Harris ever made any firm offer of ten (10) years actual incarceration to the defendant John Harvey Adamson in exchange for a plea of guilty.
- 13. The parties agree that any Federal immunity from prosecution will be in accord with the document filed by the U.S. Attorney with the Court this date.
- 14. The parties agree that the defendant will serve the agreed upon sentence in a prison outside the State of Arizona.

- 15. In the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement.
- 16. That unless the plea is rejected or withdrawn, the defendant hereby gives up any and all motions, defenses, objections, or requests he has made or raised, or could assert hereafter, to or against the Court's entry of judgment and imposition of sentence upon him consistent with this agreement.
- 17. That the defendant understands the following rights and understands that he gives up such rights by pleading guilty:
 - a. His right to a jury trial;
 - b. His right to confront the witnesses against him and cross-examine them;
 - c. His right to present evidence and call witnesses in his defense, knowing that the State will compel such witnesses to appear and testify;
 - d. His right to be represented by counsel (appointed free of charge, if he cannot afford to hire his own) at the trial of the proceedings; and
 - e. His right to remain silent, to refuse to be a witness against himself, and to be presumed innocent until proven guilty beyond a reasonable doubt.
- 18. The defendant is to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which the defendant agrees to testify as a result of this agreement.

APPENDIX B

Letter dated April 3, 1980, from Petitioner's Attorney to Attorney General's Office

Stanley L. Patchell, Esq.
Assistant Attorney General
Arizona State Capitol Building
Phoenix, Arizona 85007

Re: State of Arizona vs. John Harvey Adamson Case No. CR-93385

Dear Stan:

I am writing to confirm our telephone conversation of April 2, 1980 wherein we discussed the availability of John Adamson for interviews in preparation for his testimony in the trials of the State of Arizona vs. James Robison and Max Dunlap.

As I advised you by phone, I have met with John Adamson at his place of incareration [sic] along with my law partner, Greg Martin. We had lengthy discussions revolving around his expected testimony as well as the plea agreement that he had entered into with the State of Arizona in the above-referenced case number. Further, at that time I also delivered to Mr. Adamson a complete set of transcripts of his testimony in the trial of James Robison and Max Dunlap that was previous held.

After lengthy discussions and consideration of all of the various aspects of this case and the potential ramifications to Mr. Adamson, I can advise you of the following matters:

- 1. John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona. It is, therefore, his position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of further consideration by the State of Arizona.
- 2. John Harvey Adamson is well aware of the fact that he can be subpoenaed by your office to appear as a witness in any criminal matter; however, he is further aware that the fact that he may be called to the stand does not mean that he must testify. He does understand that he may be directly ordered by the Court to testify and, if he refuses do so, may be held in contempt by the Court.
- 3. John Harvey Adamson is further fully aware of the fact that your office may feel that he has not completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him. He is aware that if the State were successful in doing so, that he may be prosecuted for the killing of Donald Bolles on a first degree murder charge.
- 4. If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met:
- a. The State of Arizona will agree that, upon his completion of his testimony, John Harvey Adamson will be released from custody immediately. The testimony referred to herein is, of course, testimony in an additional

trial of the State of Arizona vs. Max Dunlap and possibly, testimony in a separate trial of the State of Arizona vs. James Robison. If separate trials are held, Mr. Adamson's demand for his immediate release will apply to the completion of his testimony in whichever trial goes first. This demand is not to be considered to be contingent upon any verdict being reached in either case.

- b. If the State agrees to the first condition, an additional condition will be that when John Harvey Adamson is transported to Maricopa County for his testimony in the above-referred trial, that he will not be held in a facility of the Maricopa County Jail or the Maricopa County Sheriff's Department. It is his demand that he be held in a non-jail facility with the agreement that there will be full time, that being 24-hour, protection by some law enforcement agency, preferably the U.S. Marshal's office, for Mr. Adamson's safety.
- c. As a further and separate demand, John Harvey Adamson wishes to have a complete clothing outfit prior to his testimony in any trial consisting of a new suit, new shoes, socks, etc.
- d. Mr. Adamson further demands that if his testimony is going to be requested by the State, his ex-wife Mary and his son be provided with protection until such time as Mr. Adamson is released from custody. Further, Mr. Adamson requests that an educational fund be set up for his son.
- e. Mr. Adamson further demands that, upon his release from custody, he will be provided with suitable transportation and funds in order for him to travel to a location outside of the State of Arizona to set up a new identification and life for himself. It is anticipated that the

State will work through the U.S. Attorney's office and the U.S. Marshal's office in an attempt to comply with this demand.

f. Further, John Harvey Adamson demands that, prior to any further testimony and/or interviews, he be provided with full and complete immunity for any and all crimes in which he may have been involved.

The above basically describes what Mr. Adamson's demands are for his future testimony in any case involving James Robison or Max Dunlap. As we have discussed many times in the past with Bill Schafer, the crimes for which John Adamson requires immunity in order to fully and completely answer any cross-examination by defense counsel, are not of such a nature that the State would be shocked for the State to extend immunity for those crimes. Further, I can represent that any immunity involved as far as any homicide case would be concerned would be an immunity from prosecution for any indirect, and unknowing, participation in any homicide.

By this letter, it is represented to you that John Harvey Adamson has not been directly involved in any actual homicide outside of the Don Bolles killing.

Again, I would like to re-emphasize the point that it is Mr. Adamson's position that he has fully and completely, and in good faith, fulfilled all of his obligations under the plea agreement. The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing. It is further

our position that, without some type of stipulation, a Superior Court Judge will not have any jurisdiction to change, alter, or withdraw Mr. Adamson's plea agreement and/or sentence.

I look forward to hearing from you in the near future.

Very truly yours,

MARTIN & FELDHACKER

/s/ William H. Feldhacker

WHF:ir CC/John Harvey Adamson

APPENDIX C

Letter dated April 9, 1980, from the Attorney General's Office

Mr. William H. Feldhacker Attorney at Law 1045 East Bethany Home Road Phoenix, Arizona 85014

Re: JOHN HARVEY ADAMSON

Dear Mr. Feldhacker:

In regard to the requested testimony of John Harvey Adamson in the forthcoming retrial (or retrials) of Dunlap and Robison, the position of the state is as follows:

1. The January 15, 1977, plea agreement between the state and John Adamson is still in effect. Because of this the state has the right to call upon Mr. Adamson for testimony and for interviews.

- 2. On April 9, the state did call upon Mr. Adamson, through you, for an interview regarding his testimony at the trial. As Mr. Adamson's attorney you refused to allow him to be interviewed.
- 3. Such a refusal by Mr. Adamson is a violation of the plea agreement. Because of such a refusal, the state may now institute proceedings necessary to carry into effect those things noted in the plea agreement that result from a violation by Mr. Adamson. Specifically those things include: reinstatement of the first degree murder charge against Mr. Adamson for the murder of Don Bolles and its possible punishment of death; reinstatement of all other criminal charges that were dismissed pursuant to the plea agreement; withdrawal of the state's request of the federal government to assume custody of Mr. Adamson.

Mr. Adamson should also be aware that in addition to these things that flow directly from his breach of the plea agreement the state may also institute criminal actions that were not discussed as part of the plea agreement.

In an effort to resolve this question, a deposition of Mr. Adamson has been set by Judge French for 12:30 p.m. on April 10 in the conference room of the United States Attorney's Office at the Federal Building in Phoenix. Sincerely,

ROBERT K. CORBIN Attorney General

/s/ William J. Schafer, III WILLIAM J. SCHAFER, III Chief Counsel Criminal Division

WJS/fn 0144F

BRUNETTI, Circuit Judge, with whom Circuit Judges KENNEDY, ALARCON and BEEZER join, dissenting:

Adamson has no valid double jeopardy defense to his prosecution for first degree murder, therefore I respectfully dissent.

1. Background.

John Harvey Adamson was charged with first degree murder in connection with the bombing death of Donald Bolles in Phoenix, Arizona. His first degree murder trial had commenced and was in the process of jury selection when Adamson and his attorneys struck a plea agreement with the district attorney whereby Adamson agreed to provide testimony against certain individuals, including James Robison and Max Dunlap, with regard to the murder of Donald Bolles, and to plead guilty to a charge of second degree murder. The plea agreement provided that Adamson would receive a sentence of 48-49 years imprisonment, with a maximum of 20 years, two months to be served, and that other charges pending against him would be dismissed.

The plea agreement was submitted to Arizona Superior Court Judge Birdsall for approval. At a formal hearing, the judge reviewed each detail of the plea agreement with Adamson, approved the agreement, and the first degree murder trial was suspended. The plea agreement provided for deferred sentencing; accordingly, the sentencing hearing was conducted without review of the details or consequences of the plea agreement.

2. Adamson's Double Jeopardy Claim.

A review of Adamson's double jeopardy claim must acknowledge the "unique nature of the double jeopardy guarantee as compared to other constitutional rights." United States v. Young, 544 F.2d 415, 418 (9th Cir.), cert. denied, 429 U.S. 1024, 97 S.Ct. 643, 50 L.Ed.2d 626 (1976). A double jeopardy claim implicates the "very power of the State to bring a defendant into court," and thus is collateral to, and separable from, those constitutional claims which pertain to a determination of the principal issue at trial, i.e., whether or not the accused is guilty of the offense charged. Abney v. United States, 431 U.S. 651, 659, 97 S.Ct. 2034, 2040, 52 L.Ed.2d 651 (1977). Accordingly we have held that a plea of guilty to a charge brought in violation of the double jeopardy clause does not waive a double jeopardy defense. Launius v. United States, 575 F.2d 770. 771 (9th Cir.1978).

^{1.} The double jeopardy issue was not raised by Adamson in the district court or his appeal from the district court, but was raised for the first time in this habeas corpus proceeding in appellant's Supplemental Brief on Rehearing En Banc. The double jeopardy defense had been previously rejected by this court in a prior habeas corpus proceeding. See Adamson v. Hill, 667 F.2d 1030 (9th Cir., 1983), cert. denied, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853 (1982).

Whether a double jeopardy defense may be waived is a question this circuit has yet squarely to address. The Supreme Court has declined to hold that a double jeopardy claim may never be waived. Menna v. New York, 423 U.S. 61, 63 n. 2, 96 S.Ct. 241, 242 n. 2, 46 L.Ed.2d 195 (1975). The majority of sister circuits that have considered the question have concluded that a double jeopardy defense may be waived. See, e.g., United States v. Broce, 753 F.2d 811, 822 (10th Cir.1985) (double jeopardy claim may be waived by "an informed and intentional relinquishment specifically of . . . rights under the Double Jeopardy Clause of the United States Constitution"); Brown v. Maryland, 618 F.2d 1057, 1058 (4th Cir.) (by pleading guilty after entering into a favorable plea bargain, defendant waived his right to be free from double jeopardy), cert. denied, 449 U.S. 878, 101 S.Ct. 224, 66 L.Ed.2d 100 (1980); Mc-Clain v. Brown, 857 F.2d 389, 201 (8th Cir.1978) (a bar to further prosecution because of former jeopardy is not a jurisdictional defect, but a defense or personal right which must be affirmatively pleaded or is considered waived): United States v. Perez, 565 F.2d 1227, 1232 (2d Cir.1977) (the constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be regarded as waived): United States v. Wild, 551 F.2d 418, 424-25 (D.C.Cir.) (constitutional rights which the defendant may waive include the right not to be twice put in jeopardy), cert. denied, 431 U.S. 916, 97 S.Ct. 2178, 53 L.E.2d 226 (1977): United States v. Buonomo, 441 F.2d 922, 924 (7th Cir.) (constitutional immunity from double jeopardy is a personal right which if not affirmatively pleaded at trial will

be regarded as waived), cert. denied, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 81 (1971).

Notwithstanding Menna and our decision in Launius, it is certain that the double jeopardy bar is not absolute. This is nowhere more apparent than in the context of a retrial following a mistrial. Where a mistrial has been declared without the defendant's request or consent, a new trial may take place so long as there existed a manifest necessity for the mistrial. Illinois v. Somerville, 410 U.S. 458, 461, 93 S.Ct. 1066, 1069, 35 L.Ed.2d 425 (1973). Similarly, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." United States v. Jorn, 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971). This principle reaches its limits in permitting retrial following an unnecessary mistrial, declared without the defendant's request or express consent, if the defendant's statements or silences constitute an implied consent. See United States v. Smith, 621 F.2d 350, 351 (9th Cir.1980), cert. denied, 449 U.S. 1087, 101 S.Ct. 877, 66 L.Ed.2d 813 (1981).

The mistrial exceptions to the double jeopardy bar clearly refute the notion that the bar is absolute. The Supreme Court in *United States v. Dinitz*, 424 U.S. 600, 609 n. 11, 96 S.Ct. 1075, 1080-81, n. 11, 47 L.Ed.2d 267 (1976), has stated that a defendant's double jeopardy guarantee against multiple prosecutions may be *served* by a mistrial declaration, and that the permissibility of retrial in such cases does not depend on a waiver of the defendant's double jeopardy right. In certain cases a second prosecution may follow the midtrial dismissal of an indictment without running afoul of the double jeopardy clause. *See Lee*

v. United States, 432 U.S. 23, 30, 97 S.Ct. 2141, 2145-46, 52 L.Ed.2d 80 (1977).

An exception to the double jeopardy bar pertinent to Adamson's case is described in Jeffers v. United States, 432 U.S. 137, 152, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168 (1977). In Jeffers, the defendant elected to be tried separately on greater and lesser included offenses. Although a subsequent trial on a greater offense following trial on a lesser included offense is, as a general rule, prohibited by the double jeopardy clause, see Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Jeffers Court found that the defendant's election deprived him of a double jeopardy defense to the second trial. 432 U.S. at 152, 97 S.Ct. at 2217. The Jeffers Court did not speak of "waiver"; rather, the Court concluded that no violation of the double jeopardy clause had occurred. The second trial fell within an exception to the Brown rule, based on the defendant's role in bringing about the second trial.

This view of the double jeopardy clause was expanded and strengthened in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), where the Court found permissible a second trial on two counts that had been dismissed in midtrial at the defendant's behest. The Court concluded that the policies underlying the double jeopardy clause do not extend "to include situations in which the defendant is responsible for the second prosecution." *Id.* at 96, 98 S.Ct. at 2196-97. Again the Court declined to adopt a "waiver" analysis, stating that "the double jeopardy clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Id.* at 99, 98 S.Ct. at 2198.

3. Adamson Knowingly Waived His Fifth Amendment Double Jeopardy Rights.

There is no presumption of acquiesence in the loss of fundamental constitutional rights. The courts indulge in every reasonable presumption against waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Id.

On January 15, 1977, Adamson and his three courtappointed attorneys appeared in open court before Arizona Superior Court, Judge Birdsall. Judge Birdsall reviewed the plea agreement with Adamson paragraph by paragraph, and at times, word by word. Adamson intentionally waived his double jeopardy rights when he accepted the totality of the plea agreement negotiated by his three attorneys. It is clear from the record that Adamson knew the circumstances confronting him and the consequences of entering into the plea agreement. Accordingly, his acceptance of the agreement constituted a waiver of all conflicting rights existing at that time.

The record shows the following: On January 15, 1977, Adamson was on trial as the defendant in Case No. CR 93385, Maricopa County, State of Arizona v. John Harvey Adamson, under a charge of open murder for the killing of Donald Bolles. On January 15, 1977, at a time set for continuing the voir dire examination of jurors in the case, the defense and the State of Arizona announced to the court that they had reached a plea agreement and the document with two sealed exhibits, Exhibits A and B, were presented to the court. Exhibits A and B were referred

to in, and were part of, the plea agreement. The exhibits were unsealed and Adamson signed each exhibit in open court whereupon the exhibits were replaced in their respective envelopes and sealed. The signatures of Adamson, his three attorneys and the two attorneys representing the State of Arizona were on the plea agreement.

The judge established that Adamson had four years of college education, never had any mental illness or disease, and was not under the influence of drugs or alcohol. Adamson acknowledged that his signature was on page 5 of the original plea agreement and that he had reviewed the agreement with all three of his counsel.2 Judge Birdsall told Adamson that he initially plead not guilty to the charge that he murdered Donald Bolles on or about June 2. 1976 in Maricopa County, Arizona, and now by virtue of the plea agreement he was agreeing to plead guilty to murder in the second degree. Judge Birdsall reviewed the nature of murder in the second degree, and then in detail reviewed each paragraph of the plea agreement with Adamson, receiving acknowledgements from Adamson that he understood each plea agreement provision. Adamson acknowledged that he understood that by entering a guilty plea he was giving up his constitutional rights of a speedy public trial by a jury, (his trial being into the third week and in the process of jury selection), the confrontation of witnesses, the presentation of evidence on his own behalf,

the right to compel attendance of witnesses, the right to be represented by counsel, and the right to remain silent.

Judge Birdsall reviewed paragraph 5 of the plea agreement with Adamson word for word.3 He explained to him that one of the provisions of that paragraph was that should Adamson refuse to testify or at any time testify untruthfully concerning the crimes mentioned in the agreement, then the agreement would become null and void, and he would be subject to the charge of open murder. Adamson was told that if he was charged and found guilty of first degree murder, he would be subject to the penalty of death or life imprisonment requiring a mandatory twenty-five years of actual incarceration. Adamson stated that he understood what would happen if for any reason the agreement became null and void and the open murder charges were reinstated. As a result of understanding and agreeing to that provision, Adamson with the advice of his attorneys, accepted the totality of the plea agreement and the benefits derived therefrom in exchange for the rights and powers he had relinquished as

^{2.} The judge asked "At this point do you believe you understand the provisions of the plea agreement?" Adamson answered "Entirely sir." The judge then asked Adamson "Do you have any questions that you want to ask me about before we go any further?" and Adamson answered "No sir." Transcript, Change of Plea, January 15, 1977, at 7.

Paragraph 5 of the plea agreement provides: It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charge will be automatically reinstated. The defendant will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.

set forth in the agreement. Each of the parties had now recast their legal status, and their respective rights and powers, into the terms of the integrated plea agreement which set forth their new rights and powers, including the enforcement provisions of paragraph 5.

At the conclusion of the plea agreement review Judge Birdsall read Adamson's, his attorneys' and the state prosecutors' acknowledgements of the agreement into the record. All the parties confirmed their signatures and acknowledgements. Judge Birdsall then requested Adamson to establish a factual basis for his plea of guilty to the crime of murder in the second degree, whereupon Adamson related the facts of his participation in the killing of Donald Bolles. At this point Judge Birdsall confirmed that Adamson was satisfied with the legal representation of his three court appointed attorneys and that he had no complaints concerning the manner in which they had represented him as his attorneys.

The court deferred acceptance of the sentencing provisions in the plea agreement until it could receive and

review a presentence report, and concluded by accepting the plea agreement and Adamson's plea to the charge of murder in the second degree.

On January 19, 1977, Judge Birdsall after having reviewed the presentencing report found that the provisions contained in the plea agreement regarding the sentence to be imposed upon Adamson were appropriate and that Adamson should be sentenced strictly in accordance with the provisions contained in the plea agreement. The sentencing date was to be subject to call, and the court set a review hearing in the matter for January 18, 1978, one year from the date of the hearing. All of the jurors were permanently excused and the case was recessed.

It is evident from a review of the record and of the entire plea agreement and exhibits that the purpose of the plea bargaining was for Adamson, with advice of counsel, to waive any rights he may have had at the time the plea agreement was entered into and to proceed in accordance with the terms of the agreement. He knowingly relinquished and abandoned his right to proceed with the open murder trial subject to the condition that if the agreement was breached and became null and void that the parties would be returned to the positions they were in before the agreement. If Adamson breached the agreement, he could again be subject to a first degree murder charge, but he would also reacquire the defenses he had waived, especially as to the incriminating statements he had given as part of the agreement. Adamson does not question the legal sufficiency of his counsel's advise [sic] regarding the legal rights he waived under this agreement. It is clear from the record that Adamson, with the aid of his attorneys, knowingly and willingly waived any defense

^{4.} Adamson signed the following acknowledgement: "I John Harvey Adamson, have read this agreement with the assistance of counsel, understand its terms, understand the rights I give up by pleading guilty in this matter, and agree to be bound according to the provisions herein." Adamson's three attorneys signed the following acknowledgement: "We have discussed this case and the plea agreement with the defendant. We have advised him of his rights and the consequences of his plea, and we concur in his entry of this plea." The state prosecutors signed the following acknowledgement: "We have reviewed this agreement and agree on behalf of the State of Arizona that the terms and conditions set forth herein are appropriate and are in the interests of justice."

to being subjected again to a first degree murder charge (double jeopardy). Adamson accepted the integrated terms and operation of the plea agreement in exchange for the situation he found himself in at the time the agreement was entered into.

We now must analyze what Adamson received under the plea agreement and what the other parties to the agreement expected and to what they were entitled.

At the time the plea agreement was entered into, Adamson was on trial under an open murder charge for the killing of Donald Bolles. In addition, the state could have prosecuted Adamson for the crimes listed in Exhibits A and B to the plea agreement, crimes in which Adamson's involvement was then known to the police and subject to police reports, and crimes which Adamson had revealed to the state in transcribed statements. Also there were charges in other cases pending against Adamson and other defendants in the Maricopa County Superior Court. The state had the power to try Adamson for each of those crimes, and society and the victims of all those crimes had a legitimate expectation and an interest that the state would prosecute those crimes. The state surrendered that power, and society and the victims through the state gave up their expectations and interests in exchange for Adamson's plea of guilty to the charge of murder in the second degree for the murder of Donald Bolles, and further for Adamson's promise that he would testify fully and completely as required by the plea agreement. As a result of entering into the plea agreement, not only did Adamson eliminate the possibility of being found guilty of murder in the first degree in the pending trial, but he also obtained the state's agreement not to prosecute him for the crimes listed in Exhibits A and B and in paragraph 6 of the plea agreement.

The many serious actions and charges against Adamson which could have resulted in a death penalty or imprisonment for the rest of his life were dismissed with prejudice. Adamson bargained for, and received as a result of the second degree murder guilty plea, a sentence no longer than twenty calendar years and two months. Adamson obtained federal immunity from prosecution and was allowed to serve his sentence in a prison outside of the State of Arizona. In turn all that was required of Adamson was his truthful and complete testimony concerning crimes in which he admitted he was involved, and as to which he was obtaining immunity and freedom of prosecution.

To protect the rights of the state in the plea agreement, and to insure the value of Adamson's promise to testify, paragraph 5 of the plea agreement provided that, in the event he failed to testify or defaulted in the terms of the plea agreement, the plea agreement would be be null and void and that all original charges would be reinstated.

To insure the mutual benefit and validity of the plea agreement justifying the removal of Adamson from the threat of the pending trial and all future charges and trials, Adamson waived the rights that would have precluded his being charged again and tried for open murder as a part of the mutuality of waiver of rights and powers that all parties agreed to in the plea agreement. The plea agreement redefined the rights and powers of the parties in an integrated contract. By entering into the plea agreement the parties waived any constitutional rights they may have had and substituted therefor the contractural terms and remedies. Any other interpretation renders the

plea agreement ineffectual and unenforceable from the inception.

4. Adamson's First Degree Murder Conviction is the Consequence of his Voluntary Choice and is Not Invalidated by the Double Jeopardy Clause.

The majority correctly notes that valid waiver of a constitutional right ordinarily requires that there be an "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The majority errs, however, in its implicit and fundamental premise that only a waiver could remove the double jeopardy bar to Adamson's retrial. The foregoing review of exceptions to the double jeopardy bar should dispel the notion that waiver is an invariable prerequisite to a valid second trial where jeopardy has once attached. Indeed, Jeffers v. United States, 432 U.S. 137, 152, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168 (1977), turned on this very point, and, I believe, disposes entirely of Adamson's double jeopardy claim.

In Jeffers, as in Adamson, the two prosecutions were for a greater and lesser included offense. The defendant in Jeffers sought to have the greater and lesser included offenses tried separately. The Court concluded that the defendant's role in bringing about the successive trials removed any constitutional barrier to the second prosecution. Id.

This essentially is Adamson's case. Jeopardy attached upon Adamson's entry of a guilty plea. See United States v. Vaughan, 715 F.2d 1373, 1376 (9th Cir. 1983). By entering into the plea agreement, Adamson elected the lesser included offense—second degree murder. The only difference

from Jeffers is that there, a second prosecution on the greater offense was a certainty; for Adamson it was contingent upon his breach of the plea agreement. But this distinction is without constitutional significance, and in any event would seem to weigh in favor of the state in the case before us.

The Jeffers Court noted that "the considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges." 432 U.S. at 152 n. 2, 97 S.Ct. at 2217 n. 2. In other words, a different result might have been required had the government acted unilaterally to separate the trials, or if the defendant's voluntariness was compromised or otherwise at issue. Adamson does not seriously contest his voluntariness in entering into the plea agreement, and the state can hardly be held accountable for Adamson's admitted refusal to be interviewed in preparation to testify—the triggering event which, after all, set in motion the second prosecution. Adamson must accept responsibility for the second prosecution; the double jeopardy clause "does not relieve a defendant from the consequences of his voluntary choice." United States v. Scott, 437 U.S. 82, 99, 98 S.Ct. 2187, 2198, 57 L.Ed.2d 65 (1978)

The state's freedom from blame in the events leading to Adamson's retrial distinguishes this case from Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), and Launius v. United States, 575 F.2d 770 (9th Cir. 1978). In Menna, the defendant was charged with an offense for which he had already served a sentence. Thus, the charge was one the state constitutionally could not prosecute. 432 U.S. at 62 n. 2, 96 S.Ct. at 242 n. 2. The

state had acted to place the defendant in double jeopardy; accordingly, the defendant's plea of guilty, which removed only the issue of factual guilt from the case, did not impair the defendant's legitimate double jeopardy defense. *Id*.

Similarly, in Launius, defendants pleaded guilty to a multiplicious [sic] information, and received consecutive sentences on two counts, exceeding the statutory maximum for the single offense charged. 575 F.2d at 771. The government was responsible for initiating proceedings in violation of the double jeopardy clause. The defendants' guilty pleas did not waive their double jeopardy rights. Id. at 772. In both these cases the double jeopardy violation was directly attributable to the government in the first instance.

Adamson, however, did not plead guilty to an indictment brought in violation of the double jeopardy clause. By the same token, the state did not attempt to redeem an otherwise invalid prosecution by bargaining for his guilty plea. The second prosecution sprung from the terms of the plea agreement itself. Adamson voluntarily agreed to those terms, precipitated his second prosecution, and should not now be heard to complain of the result.

Whether Adamson't actions are viewed as a waiver or as a voluntary choice, his double jeopardy claims fail.

5. Adamson Knowingly and Intentionally Breached the Plea Agreement.

There should be little doubt that Adamson breached his obligation when he expressly refused to provide interviews in preparation for his testimony in the retrial of Robison and Dunlap. The purpose of the plea agreement was to obtain Adamson's testimony concerning certain

crimes listed in the agreement and in Exhibits A and B and specifically with regard to the Robison and Dunlap trials, the defendants therein being charged with the murder of Donald Bolles. Unless Adamson's testimony as required by the plea agreement was obtained for the state there is no purpose for the plea agreement and for relieving Adamson of the charges and prosecutions listed in the plea agreement. The agreement at paragraph 5 required Adamson to testify truthfully and completely at all times. whether under oath or not, to the crimes mentioned in the plea agreement, including all interviews, depositions, hearings and trials. In paragraph 4 of the plea agreement Adamson agreed to testify fully and completely when requested by proper authorities. By his April 3, 1980, letter through his attorney, Adamson refused to provide requested pretrial interviews, in plain breach of his obligation.

I cannot agree with the majority's view that Adamson was merely advancing a reasonable interpretation of the plea agreement. The majority points to Paragraph 8, which states that Adamson would be sentenced "at the conclusion of his testimony in all of the cases," as the only unambiguous language in the plea agreement regarding the point at which Adamson's obligation to testify would terminate. This language cannot be interpreted out of context and does not bear the construction the majority places upon it. It does not support the view that, by sentencing Adamson, the state relieved him of his duty to testify. The totality of the plea agreement suggests, and common sense demands, that Adamson was required to testify in the Dualap and Robison trials whenever called upon to do so.

Paragraph 8 of the plea agreement provides "All parties to this agreement hereby waive the time for sentencing and agree that the defendant will be sentenced at

the conclusion of his testimony in all of the cases referred to in this agreement and in Exhibits A and B, which accompany it." (Emphasis added). Adamson argues that because he was sentenced before the retrial of the state's cases against James Robison and Max Dunlap he had no obligation under the plea agreement to testify at the retrial of those two cases. Adamson is incorrect in his contention and the record contains substantial evidence clearly supporting the conclusion that he knowingly and intentionally breached the plea agreement.

Adamson's attorney, William H. Feldhacker,5 wrote a letter to the Assistant Attorney General on April 3, 1980, (Appendix B to the majority opinion) stating that he and his law partner had met with John Adamson, and that after lengthy discussions and considerations of all the various aspects of the case and potential ramifications to Mr. Adamson, he was advising the Attorney General of the following matters contained in the letter. The letter stated, "John Harvey Adamson believes that he has fully complied with and completed his plea agreement entered into with the State of Arizona. It is, therefore, his position that his future testimony in any case involving the defendants Max Dunlap or James Robison regarding the killing of Donald Bolles will only be given upon the offer of further consideration by the State of Arizona." (Emphasis added).

The reason for the letter is apparent from its first paragraph wherein it confirmed telephone discussions between the state attorneys and Adamson's attorneys as to the availability of Adamson for interviews in preparation for his expected testimony in the retrials of the State of Arizona against James Robison and Max Dunlap. Interviews are clearly and explicitly stated as one of Adamson's obligations in the plea agreement. Throughout the letter the wording establishes that the statements are communications from John Adamson through his attorney to the state. "John Harvey Adamson is well aware of the fact that he can be subpoenaed . . . by your office to appear as a witness in any criminal matter, however, he is further aware that the fact that he may be called to the stand does not mean he must testify" (paragraph 2); "John Harvey Adamson is further fully aware of the fact that your office may feel he has not completed his obligations under the plea agreement in CR-93385 and, further, that your office may attempt to withdraw that plea agreement from him" (paragraph 3); "If the State of Arizona desires to have Mr. Adamson testify in any further proceedings against James Robison or Max Dunlap, it is John Adamson's position that the following conditions must be met." (Paragraph 4). And then Adamson listed his demands.

Adamson's attorneys do not render their opinion as to whether Adamson's position is correct or reasonable—only that Adamson had taken a position. The language of the letter is carefully couched in this regard. The second sentence in the last paragraph states that "The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing."

One of the same three attorneys that appeared for Adamson at his trial, the change of plea hearing and the sentencing hearing.

What the plea agreement states is controlling, not what Adamson at the moment of breach alleges was anticipated.

The plea agreement defines the time for sentencing, but it does not set the time for an absolute conclusion of Adamson's duty to testify. Paragraph 18 of [sic] plea agreement states that Adamson was to remain in the custody of the Pima County Sheriff from the date of the entry of his plea until the conclusion of his testimony in all of the cases in which Adamson agreed to testify. That paragraph does not limit his duty to testify only to such time that he remains in the custody of the Pima County Sheriff. The plea agreement and the sentence had been accepted by Judge Birdsall and there remained only a ministerial act of a sentencing hearing to complete the imposition of the sentence fixed by the plea agreement. Adamson's change in status with the Pima County Sheriff and the sentencing only changed the place of his incarceration. That ministerial act of sentencing did not change nor could it change his guilty plea, or the acceptance of a guilty plea by the court, or the terms of the plea agreement including the sentence fixed by the plea agreement. When the plea agreement was finally accepted by the judge he stated "The defendant will be sentenced strictly in accordance with the provisions contained in the plea agreement."6 The sentencing date was set by Judge Birdsall at that time for January 18, 1978, in accordance with his policy and practice not to leave any criminal case sentencing date on a subject to call basis.

The procedure in paragraph 8 waived the time for sentencing and set a time for sentencing not for setting a conclusion on Adamson's duty to testify or rotestify in a retried case. This subject was discussed with Adamson and all attorneys by Judge Birdsall at the change of plea hearing on January 15, 1977. Judge Birdsall apprised Adamson that he was entitled under the Arizona Rules of Criminal Procedure to be sentenced within ninety days from the acceptance of his plea agreement and that pursuant to the agreement he was waiving the time for sentencing.

The record establishes that Adamson's continuing obligation to testify, before and after sentencing, was known and understood by Adamson and his attorneys. This is clearly set forth in the dialogue at the December 7, 1978, sentencing hearing before Judge Birdsall in Case No. CR-93385. Adamson and his attorneys, Gregory H. Martin and William H. Feldhacker, were present, together with the Assistant Attorney General William J. Schafer III. As the court was proceeding with the plea agreement, the following was said:

THE COURT: All right. The court's sentencing is limited by the terms of the plea agreement which was entered in this case, which was previously accepted by the Court and the Court is going to proceed with the sentencing in accordance with that plea agreement. Do you have anything Mr. Schafer?

MR. SCHAFER: Yes, I would like to add one thing. I wish the record would show that it has been discussed with counsel, and I believe counsel has discussed it with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony.

Case No. CR-93385, State of Arizona v. John Harvey Adamson, January 19, 1977 Transcript, Wednesday, 10:00 a.m., before Judge Birdsall, page 37, lines 13-15.

THE COURT: The record may show that.

MR. FELDHACKER: That's our understanding.

MR. MARTIN: That's correct.

Transcript at page 43. (Emphasis added).

Adamson was then sentenced.

It is Adamson's position at this time that his former attorneys have sworn that the "further testimony" involved a wholly separate case than the Bolles murder case, and arising out of the arson of the Ashford Plumbing Company in Phoenix, Arizona. See page 3 n. 2 Appellant's Supplemental Brief on Rehearing En Banc. In fact, that "further testimony" is testimony contemplated by and included specifically in the plea agreement, the Ashford Plumbing Company case being one of the cases listed in Exhibits A and B to the plea agreement. Adamson's counsel, William Feldhacker, in his argument of Adamson's petition for special action before the Arizona Supreme Court on May 28, 1980, appeared with Adamson's other former attorney, Glen [sic] Martin. Mr. Feldhacker stated to the court his explanation of the colloquy between counsel at the sentencing hearing before Judge Birdsall regarding the "further testimony." He told the Arizona Supreme Court that at the time of sentencing there was one case left which required Adamson's testimony, and it was from Exhibits A and B appended to the plea agreement, State of Arizona versus Ashford. He admitted to a conversation with Mr. Schafer discussing the Ashford case, in which he agreed that, if necessary Adamson may have to testify in that case.7

(Continued on following page)

It is obvious that testimony after sentencing was contemplated by the clear language of the plea agreement and understood and intended by the parties. Adamson's anticipated testimony in the *Ashford* case after sentencing was not an addition to or amendment of the plea agreement by the parties, but was one of Adamson's obligations

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JUSTICE HAYS: Counsel, do you give any weight to that portion of the sentencing where I think Mr. Schafer indicated, Now have it clear for the final acceptance of this plea. We have it clear that Mr. Adamson testified some more—or something to that effect, and, nobody seemed to object to that position. I make this response. Was that understood? Does that have any weight, or does it mean—

MR. FELDHACKER: As to the meaning of that, Your Honor—I think that was on December 7, 1978—I believe I have in my notes—I have that there was a discussion of that. I don't think it's as clear as Your Honor stated, but it's clear that it's undestood that it happened.

What happened was that we were asked if there was any legal cause for Mr. Adamson not to be sentenced. We certainly stated there was none. Mr. Schafer said, Yes, I would like to add one thing. I wish the record would show that it has been discussed with Counsel, and I believe Counsel has discussed it with Mr. Adamson, that it may be necessary in the future to bring Mr. Adamson back after sentencing for further evidence. The record may show that; and I stated, That's our understanding.

Subsequently there was one case left from exhibits A and B that were appended to that plea agreement, and that case left was State of Arizona versus Ashford. It's a case that was under investigation. It's basically—I would submit from my conversation with Mr. Schafer—a case that they concluded they would never be able to actually put together and prosecute. However, Mr. Schafer discussed it with us—about the Ashford case; about the fact that, you know, we had that in the agreement; that, if necessary, he may have to testify in that case.

Adamson v. Superior Court, No. 14898, Transcript of Proceedings, May 28, 1980, commencing at page 6, line 21. (Emphasis added).

The following conversation took place in the Arizona Supreme Court hearing:

required by the plea agreement, acknowledged by Adamson, Adamson's counsel and the state at Adamson's sentencing hearing on December 7, 1978. Adamson can not assert a reservation for refusal to further testify after sentencing in the *Robison* and *Dunlap* Bolles murder cases, and at the same time acknowledge an obligation to testify in the *Ashford* case after sentencing. The plea agreement makes no such distinctions.

Adamson, in an attempt to take a negotiated advantage as a result of the reversal of the Robison and Dunlap cases refused to testify. He attempted to better his position but also took the risk of the refusal to testify. His position at the same time frustrated the state's prosecution of Robison and Dunlap cases and destroyed the very essence of the plea agreement. Adamson never raised the defense of double jeopardy during the time when he was receiving the benefits guaranteed to him by the plea agreement. However, when the Arizona Supreme Court held that Adamson had breached the plea agreement by refusing to testify, and vacated the second degree murder conviction and sentence and reinstated the open murder charge, Adamson then asserted the position that the plea agreement violated his double jeopardy rights. In fact, those

(Continued on following page)

rights were waived when he entered into the plea agreement, and the reinstatement of the first degree murder charge was the consequence of his voluntary choice and excepted from the double jeopardy defense, as fully discussed supra.

In order to escape a possible first degree murder conviction in the trial which was pending at the time of the plea agreement, Adamson accepted all the benefits the state was willing to give for his testimony. Then when faced with further testimony in the Robison and Dunlap cases he attempted to compound his benefits, with further detriment to the state, for the "additional testimony" which was in fact fully contemplated by the plea agreement. The plea agreement and the statements Adamson gave in connection with the plea agreement ostensibly set forth all of the crimes which he was willing to reveal and obtain dismissal and immunity for. However, in paragraph 4(f) of his demand letter of April 3, 1980, Adamson demands further immunity for any and all crimes in which

(Continued from previous page)

denied due process for failure of the courts to hold a full evidentiary hearing to determine that material facts surrounding the breach of the plea agreement. In unpublished Memorandum No. 80-5941 this court on November 30, 1981 affirmed the district court dismissal of Adamson's habeas corpus petition, and upheld the Arizona Supreme Court and federal district court interpretation that Adamson had breached the plea agreement by refusing to testify, and that the plea agreement did not contemplate renegotiation in the event of a retrial. This court further held that Adamson's double jeopardy rights had not been violated, and that due process did not require an evidentiary hearing. Adamson v. Hill, 667 F.2d 1030 (9th Cir., 1981) see page 5 n. 4. The United States Supreme Court denied certiorari on March 1, 1982, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853.

Adamson v. Superior Court, 125 Ariz. 579, 583, 584, 611 P.2d 932, 936, 937 (1980).

^{9.} It was at this point that Adamson filed his first Petition for Writ of Habeas Corpus in the district court which was dismissed on September 26, 1980. Adamson then appealed that order to this court claiming that the rejection of his double jeopardy argument by both the Arizona Supreme Court and the district court rested on erroneous interpretations of the plea agreement, and that he was

he may have been involved. This is a request for more protection when the state is still only trying to obtain what it had originally had [sic] bargained for; testimony with regard to the Donald Bolles murder and the other crimes listed in the plea agreement.

After Adamson proceeded in breach of the agreement, the sequence of events that followed was entirely predictable; indeed, the outcome was specified by the plea agreement. Because the results of Adamson's breach were fully contemplated and determined by the plea agreement, it should be upheld by this court.

6. Prosecutorial Vindictiveness.

I would also reject Adamson's claim that his second conviction violates due process because it is the product of prosecutorial vindictiveness.

In advancing this claim, Adamson relies primarily on the Supreme Court's decision in Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The Court in lackledge held that due process forbids a prosecutor from bringing increased charges in retaliation to a defendant's exercise of a constitutional right. Id. at 27-28, 94 S.Ct. at 2102-03. The prohibition against prosecutorial vindictiveness does not require evidence that retaliatory motivation actually existed; rather, it is to the appearance of vindictiveness that the prohibition is directed. The underlying policy is to insure that apprehension of retaliation does not deter a defendant's exercise of the right to appeal or to collaterally attack a first conviction. Id. at 28, 94 S.Ct. at 2102-03.

The problem for Adamson is that he can point to no exercise of a constitutional right that precipitated his second prosecution on an increased charge. Indeed, the retrial came about because of his breach of a plea agreement. Because there had been no exercise of a constitutional right, the *Blackledge* "presumption of vindictiveness," and the policy underlying it, does not apply.

Although Adamson invoked his fifth amendment rights when he refused to testify at a pretrial hearing in the Dunlap and Robison retrials, this exercise of a constitutional right was wholly unconnected to his reprosecution. Adamson had acted in breach of the agreement by his letter of April-3, 1980. The state, by its letter of April 9, 1980, had already indicated that it considered that Adamson had breached the agreement, and his breach permitted reinstatement of the original charges and Adamson's original defenses.

The prosecutor's freedom to seek increased charges is vital to the integrity of the plea bargaining process, and is well supported by case law. The Supreme Court in Bordenkircher v. Hayes, 434 U.S. 357, 364-65, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978), held that a prosecutor properly could use the threat of increased charges to secure a plea agreement. This is exactly what happened in Adamson's case. The prospect of a first degree murder charge induced Adamson to plead guilty to second degree murder and to promise to testify against Robison and Dunlap and as further specified in the plea agreement. The agreement provided for reinstatement of the first degree murder charge in the event of breach.

It is totally unreasonable and senseless to suggest that the prosecutor could fairly strike a bargain with a first degree murder reinstatement provision, but that prohibitions against prosecutorial vindictiveness prevent his carrying it out.

The evidence supported the first degree murder charge against Adamson, and society and the victims had a legitimate interest in seeing that charge filed and pursued. In view of the especially savage Bolles murder contract it would have been amazing if the prosecutor had filed anything else. There is no vindictiveness evident in the prosecutor's intent to retry Adamson. The intent to retry arose long before Adamson refused to testify as it was included in the paragraph 5, reinstatement provision of the plea agreement. Allowing Adamson to decide whether or not he should breach the plea agreement or to challenge it constitutionally, and once having lost the challenge to again volunteer to perform the plea agreement makes the reinstatement clause totally illusory. This gives Adamson the unilateral right to defeat the substance and value of the plea agreement. The threat of the death penalty against Adamson was necessary to insure performance of Adamson's promise that he would testify in accordance with the plea agreement. In any trial or retrial once the trial court swears and seats the jury and the trial proceeds double jeopardy attaches as to that specific defendant. Crist v. Bretz, 437 U.S. 28, 29, 98 S.Ct. 2156, 2157-58, 57 L.Ed.2d 24 (1978). If at that point Adamson takes the stand and asserts the Fifth Amendment, which he had the power (not the right) to do under the plea agreement, then the Dunlay or Robison cases or any other case in which he was to testify cannot be prosecuted. Adamson in fact did that and caused that exact result with his breach letter of April 3. 1980. In fact, in paragraph 2 of his letter he evidenced his threat that he could not be made to testify. At that point a contempt citation did not bother Adamson. The heart of the plea agreement is the default clauses, paragraphs 3, 5, 11 and 15, containing the reinstatement of open murder charges to prevent Adamson from unilaterally defeating the agreement. Adamson's testimony and credibility were crucial to the conviction of Dunlap and Robison. See State v. Robison, 125 Ariz. 107, 608 P.2d 44, 45 (1980). Adamson's unilateral nonnegotiable demands for his testimony in the retrials destroyed his credibility and the state acted without vindictiveness and appropriately under the agreement to reinstate the open murder charges.

7. The Improper Reinstatement of the Second Degree Murder Conviction and Sentence.

The majority erroneously reads Paragraph 5 in isolation and concludes that under its provisions Adamson's breach would result only in voiding the executory agreement but would have no effect on the second degree murder judgment of conviction and sentence. To the contrary. Paragraph 15, by its very term applies where the agreement has been voided, and requires that the parties be returned to their positions prior to agreement. Thus the majority's view that the conviction and sentences somehow would survive is refuted by a plain reading of the agreement itself. To leave Adamson with a second degree murder conviction based on his guilty plea, and with a sentence meted out precisely according to the terms of the agreement, would hardly return him to his position before the agreement.

Adamson cannot again be tried for first degree murder, the plea agreement has been made unenforceable and

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worthless by the majority opinion, and the parties are left with the scattered remains of all the proceedings which have transpired.

Reinstatement of the second degree murder judgment and sentence is not before this court. The majority, however, having freed Adamson from the death penalty, attempts to prevent his release by imposing upon the Arizona Supreme Court the burden of reinstating the second degree murder conviction within six months. If for any reason the Arizona Supreme Court fails to reinstate the conviction within the six months, Adamson, who has admitted to the involvement in and commission of the crimes set forth in the plea agreement, will go free. Adamson's status may be in question if the Arizona Supreme Court is unable to reinstate the conviction until after six months. The Arizona Supreme Court's burden is further enhanced by the spectre of another double jeopardy attack based upon the reasoning of the majority opinion. I respectfully submit that the plea agreement was negotiated by the parties to avoid the complications and convolutions brought on by the majority's misinterpretation of the plea agreement, all as set forth in this dissent.

I would affirm the district court's denial of Adamson's petition for writ of habeas corpus.

KENNEDY, Circuit Judge, dissenting:

I concur in general in the dissent by Judge Brunetti and find compelling his demonstration that this defendant so well understood the mechanics of the plea bargain and the risks consequent from breach that the majority's requirement of double jeopardy waiver is pointless. With all respect, I submit the majority's analysis rests on other explicit and implicit assumptions that are quite contrary to settled principles of double jeopardy law. I dissent separately to make clear the full extent of my disagreement with the analysis apparently adopted by a majority of the court.

As I explain further below, the principal error of the majority is its assumption that a conviction resting on a plea agreement protects the defendant against trial for a higher offense if the plea or the conviction on which it stands is properly set aside. I submit this is incorrect. The extent of double jeopardy protection when a guilty plea and conviction are set aside requires an inquiry into the grounds upon which they were set aside. If the conviction here could not stand by reason of a breach of the plea agreement, the defendant could be tried on the same charge or on a higher one, for the conviction rested on the plea alone, not a trial, and the plea was set aside by reason of the defendant's own default, not by the mere fiat of the state. The majority's first false premise is that there was a double jeopardy right to be waived; there was not. The second false premise is that express waiver was required; it was not. The third false premise is that the contract was not a waiver in itself; it was. I turn to a more detailed discussion of these matters.

To begin with, jeopardy may attach upon the entry of a guilty plea. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969). Guilty pleas are entered under such a variety of circumstances that a general rule is not easily stated, but I should

think that when a plea of guilty is accepted on the record and nothing remains but to pass sentence and enter the conviction, jeopardy attaches upon entry of the plea. United States v. Cruz, 709 F.2d 111, 112, 115 (1st Cir.1983) (holding jeopardy attached upon acceptance of the plea). Despite the majority's statement to the contrary, there were no conditions attendant upon acceptance of this plea, other than the terms of the written plea bargain itself. I would conclude that jeopardy attached upon entry of the plea. With this principle in mind, a major defect of the majority opinion becomes apparent. By the majority's reasoning, Adamson could have renounced the agreement a week after it was made and, as it holds double jeopardy had not been waived, he would have the same incredible immunity from the agreement's enforcement mechanism as the majority grants him because the conviction and sentence were entered.

The question becomes what jeopardy protection remained after the plea and conviction were set aside. The quality and degree of jeopardy protection derived from a conviction based on a voluntary plea must be confronted by the majority. When the plea or conviction based upon it is set aside and further proceedings commence, the authorities do not support the premise that prosecution for a greater offense is necessarily prohibited. Where a conviction is set aside, the protections of the double jeopardy clause are only in proportion to, not greater than, the risks assumed by the defendant in the former proceeding. As the plea does not put a defendant at risk of a determination of guilt for a higher offense, a charge for the higher offense may be reinstated when and if the plea or

its consequent conviction are set aside, absent, say, a circumstance in which the state somehow is entitled to set aside the plea but acts unilaterally and without cause to impose greater burdens on the defendant.

In United States v. Barker, 681 F.2d 589 (9th Cir. 1982), the defendant agreed to plead guilty to second degree murder. She successfully had the conviction set aside on a section 2255 motion, on the ground that she had not been adequately informed of the nature of the second degree murder charge. Id. at 590. Her retrial for first degree murder was held not barred by double jeopardy, because the court's acceptance of the plea to second degree murder did not constitute an implied acquittal of first degree murder. Id. at 590-92. As Judge Hug noted in his opinion for the court in Barker, the precedents are in full accord. Klobuchir v. Pennsylvania, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031, 102 S.Ct. 566, 70 L.Ed.2d 474 (1981) (where conviction of third degree murder set aside, double jeopardy did not bar trial for murder in the first degree, as the prior conviction rested on a plea, not a trial); Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979) (after guilty plea and conviction of murder and dismissal of aggravated murder charge in state court, defendant's appeal in effect withdrew the plea and the original, more serious charge can be reinstated). The rule of Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is simply not controlling, though the majority assumes its applicability without discussion. That case discusses double jeopardy protections which stem from a plea and a conviction that remain in force, not a plea and conviction that are set aside. Here the state ordered the conviction vacated under terms agreed upon by the defendant, and so acted on a clean slate. In Brown the prosecution attempted to proceed when the conviction on a lesser charge remained in force and unimpeached. Though I reject the fanciful notion that the rule of double jeopardy gives any help at all to the defendant in the face of the express terms of this plea bargain, even if those rules do apply, they do not support the result the majority reaches. The plain fact is there was no double jeopardy protection to waive if the plea and conviction were to be set aside by the defendant's own acts of default. Adamson not having undergone a trial on the merits and not having established innocence to the charge of murder in the first degree, the trial could and did proceed on the greater charges without offending constitutional principles.

We may turn next to examination of the waiver rules the majority applies to the case. Here too the court departs from controlling authority. Jeopardy is waived in a number of instances by the defendant's own actions, and no express waiver or admonition is required before the court finds the waiver to have taken place. If a defendant moves for mistrial and obtains it, jeopardy is waived though he was not forewarned of such a consequence. United States v. Dinitz, 424 U.S. 600, 609 n. 11, 96 S.Ct. 1075, 1080-81 n. 11, 47 L.Ed.2d 267 (1976). This same result occurs where a guilty plea is withdrawn or the conviction based upon it is set aside by reason of the defendant's action. See United States v. Barker, 681 F.2d 589 (9th Cir.1982) (defendant appeals plea-based conviction). The state can retry the defendant, and the authorities contain no requirement that he be forewarned of such a result. See, e.g., United States v. Jerry, 487 F.2d 600, 606 (3d Cir.1973) ("where a defendant by his own motion causes the withdrawal of his guilty plea, he has waived his right not to be put in jeopardy a second time"). In the case before us, of course, the defendant was forewarned of the consequences attendant upon breach of the plea agreement. The agreement specifically set forth that the defendant could be retried for murder in the first degree if a breach of the agreement caused the conviction to be set aside, which, as I have demonstrated, is the law in any event.

The majority seems to proceed on the assumption that jeopardy did not attach until the sentencing hearing, and on the further assumption that the record was somehow confused by the colloquy respecting defendant's obligation to give further testimony. As I have indicated, jeopardy attached much earlier, upon acceptance of the plea; and, in any event, the protections of the double jeopardy clause do not extend where the defendant did not face a trial and a plea-based conviction is properly set aside. Beyond this, waiver is not required in any event. Prosecutors do not have to explain the mysteries of double jeopardy before entering into an enforceable plea agreement. The whole purpose of such agreements, as in this case, is to permit the defendant to plead to lesser charges subject to the risk of facing more serious ones if he does not keep his end of the deal. For the court, deus ex machina, to drop the idea of double jeopardy and waiver into the plea bargain context is inconsistent with any reasonable interpretation of the contract made between the defendant and the state. The contract makes no sense if by some legal theory it is contended defendant did not accept it with full knowledge and understanding of its enforcement terms. The defendant well knew that he could

not be required to accept the enforcement terms of the plea agreement, and in this context the failure to advise him of his double jeopardy rights is quite beside the point. Indeed, if the phrase "double jeopardy" had been added to the litany of rights the defendant was asked to waive in the plea agreement, competent defense counsel most surely would have objected to it. For in truth the defendant was not waiving double jeopardy. Its protections would not apply in the event of the breach; and if the second degree conviction remained in force, the defendant was entitled to the protections of the double jeopardy clause. Had the conviction remained in force, there could have been no trial for newly discovered evidence, no new sentencing procedure, or no further trial to impose heavier burdens upon him. Any general waiver of double jeopardy simply would have confused the record.

I recognize that the state has raised certain questions by having entered the second degree conviction before the terms of the bargain were fulfilled, but whether that was in violation of the agreement or somehow excused the defendant's further performance is simply a state law issue, not a double jeopardy question. The critical issue in the case becomes whether the defendant's acts were in breach of the agreement. That issue is one of state law, nothing more. Its outcome depends on primary and historical facts, which we have no authority to determine. See Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980). Even if we did have authority to scan the state's finding that there was a breach of the agreement, there is ample support for it. The defendant agreed that the first degree charges could be reinstated for a breach, and nothing in the later proceedings changed that compact. When the defendant first gave the state notice of his refusal to cooperate further, his own attorneys specifically noted the possibility that the state would interpret noncooperation as a breach. The defendant took a risk not without some attractions for him. He was serving a twenty-year sentence. If the state elected to try him for first degree murder, conceivably he might have won an acquittal. It is hardly surprising that one as depraved as Adamson would shrink from a breach of contract and a gamble on the results. The court errs in not recognizing his defiance for what it is.

Finally, the court papers over the consequences of its ruling by telling Arizona it need not set Adamson free if it can find some way to reinstate the second degree murder conviction. We cannot, of course, by our own authority order that conviction reinstated. The matter has not been argued to us, but it may be that under Arizona law reinstatement is not permitted. Given our erroneous double jeopardy ruling, there can be no retrial for first degree murder; given the Arizona court's final determination that the plea bargain was breached and its ruling that the second degree murder conviction should be vacated, it is not clear to me that as a matter of state law it can turn around and change its decision to accommodate our error. Though I intimate no views as to the outcome under Arizona law, it is not beyond possibility that as a result of our decision the defendant will walk free.

In the context of the plea bargain before us, the double jeopardy analysis of the court is artificial. It gives the defendant a windfall of the kind that results when a court imposes a constitutional interpretation of new dimensions in what should have been a simple case of the making of a bargain and the failure to keep it. I dissent.

No. 86-6

Supreme Court, U.S. F I L E D

NOV 20 1986

JOSEPH F. SPANIOL, JR.

Supreme Court of the United States

October Term, 1986

JAMES G. RICKETTS, et al.,

Petitioners,

VS.

JOHN HARVEY ADAMSON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

- 1. Are state court findings that a plea agreement required the defendant to testify and that his refusal to do so was a breach findings of historical fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d)?
- 2. When a defendant signs a plea agreement stating that he understands that if he breaches the agreement he will be subject to prosecution on the original charge and the death penalty that accompanies it, and then after pleading guilty to a lesser charge he deliberately breaches the agreement, does the double jeopardy clause prevent prosecution on the original charge?

PARTIES

Petitioners are James G. Ricketts, Director, Arizona Department of Corrections, and Donald Wawrzaszek, Superintendent of the Arizona State Prison; Respondent is John Harvey Adamson.

TABLE OF CONTENTS

QUESTIONS PRESENTED	######################################
PARTIES	
TABLE OF CASES AND AUTHORIT	
OPINIONS BELOW	
JURISDICTION	
CONSTITUTIONAL PROVISIONS IN	
STATEMENT OF THE CASE	
SUMMARY OF ARGUMENT	
ARGUMENTS	
I. INTERPRETATION OF A PLE MENT IN A STATE CRIMINAL ING IS A STATE QUESTION, ARIZONA SUPREME COURT'S WERE ENTITLED TO A PRESUL CORRECTNESS AND ARE AN TAINED BY THE RECORD.	A AGREE- PROCEED- AND THE FINDINGS MPTION OF
II. BECAUSE ADAMSON'S DELIBITIONS RESULTED IN HIS RETION FOR FIRST-DEGREE MUIDOUBLE JEOPARDY CLAUSE PREVENT THE PROSECUTION.	EPROSECU- RDER, THE DID NOT
CONCLUSION	

TABLE OF CASES AND AUTHORITIES

Page
CASES
Adamson v. Hill, No. 80-5941 (1982)
Adamson v. Ricketts, 789 F.2d 722 (9th Cir., en banc, 1986)1, 14
Adamson v. Ricketts, 758 F.2d 441 (1985)
Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932 (1980)
Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979) 26
Jeffers v. United States, 432 U.S. 137 (1977)26, 27
Klobuchir v. Commonwealth of Pennsylvania, 639 F.2d 966 (3d Cir. 1981)26
Knapp v. Cardwell, 667 F.2d 1253 (1982) 16
Mullaney v. Wilbur, 421 U.S. 684 (1975) 16
Santobello v. New York, 404 U.S. 257 (1971) 26
State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983)1, 3, 4, 13
State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980) 6
State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980)
Sumner v. Mata, 449 U.S. 539 (1981)
United States v. Anderson, 514 F.2d 583 (7th Cir. 1975) 26
United States v. Ball, 163 U.S. 662 (1896)25, 26
United States v. Barker, 681 F.2d 589 (9th Cir. 1982) 26
United States v. Dinitz, 424 U.S. 600 (1976)25, 26
United States ex rel. Williams v. McMann, 436 F.2d 103 (1971)
United States v. Jorn, 400 U.S. 470 (1971) 26

TABLE OF CASES AND AUTHORITIES—C	ontin	ıed
	Pa	age
United States v. Scott, 437 U.S. 82 (1978)	**********	27
United States v. Williams, 534 F.2d 119 (8th Cir. 1976)	9	26
Ward v. Page, 424 F.2d 491 (10th Cir. 1970)	**********	26
AUTHORITIES		
28 U.S.C.		
§ 1254(1)		2
§ 2254(d)	12,	14
United States Constitution		
Fifth Amendment	2, 8,	20
Fourteenth Amendment		

OPINIONS BELOW

- 1. The Arizona Supreme Court's determination, after a hearing, that Adamson, by the terms of the plea agreement, forfeited the protection of double jeopardy if he breached the agreement, and that he did breach the agreement. Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932 (1980).
- 2. The Ninth Circuit's memorandum decision in 1981 affirming the district court's dismissal of Adamson's first federal habeas, and agreeing with the district court's and the Arizona Supreme Court's findings that Adamson forfeited double jeopardy protection by the terms of the agreement and breached the agreement. Adamson v. Hill, No. 80-5941, Memorandum Decision (9th Cir. Nov. 30, 1981), cert. denied, 455 U.S. 992 (1982).
- 3. The Arizona Supreme Court's affirmance of Adamson's conviction and death penalty following his trial for first-degree murder. State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 464 U.S. 865 (1983).
- 4. The Ninth Circuit's panel opinion affirming Adamson's conviction for first-degree murder and his death penalty. Adamson v. Ricketts, 758 F.2d 441 (1985).
- 5. The Ninth Circuit's en banc opinion reversing Adamson's conviction for first-degree murder and his death penalty. *Adamson v. Ricketts*, 789 F.2d 722 (9th Cir., en banc, 1986).

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit denied petitioners' motion for rehearing June 6, and the petition for certiorari was docketed in this Court July 3.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution:

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb

The pertinent portion of the Fourteenth Amendment:

[N]or shall any state deprive any person of life, liberty, or property without due process of law

STATEMENT OF THE CASE

The Crime

June 2, 1976, John Harvey Adamson attached an explosive device to the underside of the Datsun newspaper reporter Don Bolles drove. While Adamson was doing this, Bolles was in the Clarendon House Hotel, lured there by Adamson in hopes Adamson would give him information concerning a story. After placing the bomb, Adamson left the Clarendon and placed a telephone call to Bolles, who was still waiting in the lobby of the Clarendon.

Adamson told Bolles he could not meet with him that day, and they agreed to meet later. Bolles left and as he began to back out of his parking space, the bomb was detonated by a cohort of Adamson with a remote control device at the far end of the parking lot. The force of the explosion literally tore Bolles apart. With three limbs amputated, he lingered for 11 days. Before dying, he identified a picture of Adamson as the man who made the appointment to meet him at the Clarendon House. State v. Adamson, 136 Ariz. 250, 253, 665 P.2d 972, 975, cert. denied, 464 U.S. 865 (1983); (J.A. at 33-35).

Because it was impossible to decide the double eopardy claim without examining the record from Adamson v. Hill, the first habeas case, defense counsel moved the Ninth Circuit to augment the record in this case with that record. (J.A. at 175-76.) Petitioners did not oppose the motion and the Ninth Circuit granted it August 30, 1985. (J.A. at 177.)

Because petitioners will cite to both records, we will distinguish them by referring to the first habeas case as *Hill* and the second habeas action, the case at hand, as *Ricketts*.

^{1.} The Ninth Circuit decided the double jeopardy issue against Adamson in his first habeas corpus action, Adamson v. Hill, memorandum decision, No. 80-5941 (9th Cir., Nov. 30, 1981), cert. denied, 455 U.S. 992 (1982). Adamson did not argue double jeopardy to the district court in his second habeas action, nor in his briefs to the Ninth Circuit panel that affirmed his conviction and death penalty in Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985). Also he did not raise it in his brief suggesting rehearing en banc. After the en banc court, by order of July 12, 1985, instructed the parties to brief that settled issue, he addressed it in his supplemental brief on rehearing en banc. At page 12, n.7 of that brief, he said that he had not "emphasized" that issue because it had been rejected in his first habeas, but claimed he had preserved it in his amended petition before the district court. He cited to the amended petition paragraph 8(H). The correct citation is paragraph IX(H) of the amended petition in the second habeas, but that argument focuses upon alleged arbitrary and capricious imposition of the death penalty, not double jeopardy.

From information Bolles told them before he died, police obtained a search warrant for Adamson's apartment. In it they found materials similar to those used to make the bomb attached to Bolles' car. State v. Adamson, supra, 136 Ariz. at 253-54, 665 P.2d at 975-76.

After the bombing, Adamson bragged to an acquaintance that he had received \$10,000 for the killing from people who wanted Bolles eliminated because "this guy was giving people a lot of hard times and stepping on people's toes." State v. Adamson, supra, 136 Ariz. at 254-56, 665 P.2d at 976-78.

The First Trial

In June 1976 the state charged Adamson with murder. While jury selection was in progress, the parties entered into a plea agreement. Adamson agreed to plead guilty to second-degree murder, to receive a sentence of 48 to 49 years to date from June 13, 1976 (the date of his arrest), with actual incarceration to be 20 calendar years and 2 calendar months. (J.A. at 195.) Paragraph 4 of that agreement required Adamson's full and complete testimony in any court, state or federal, when requested by the proper authorities against any and all parties involved in the murder of Don Bolles, and in other specified cases included in the plea agreement and the attachments to the plea agreement. (J.A. at 196.) Paragraph 5 of the agreement specified that Adamson would testify truthfully and completely at all interviews, depositions, hearings and trials, whether under oath or not, to the erimes mentioned in the agreement. That same paragraph provided that, if Adamson refused to testify at

any time, or if he testified untruthfully or omitted any material fact in his statements, the entire plea greement would be null and void and the original charge would be automatically reinstated. He would then be subject, the agreement continued, to the charge of open murder and, if found guilty of first-degree murder, to the penalty of death or life imprisonment. The state would also be free to file any charges that had not been filed on the date of the agreement. (J.A. at 196.) Paragraph 15 of the plea agreement further provided that if the agreement became null and void, the parties would be returned to their original positions before the plea agreement. (J.A. at 199.) In exchange for his cooperation, the state agreed not to prosecute Adamson for numerous crimes listed in paragraph 6 of the agreement. (J.A. at 197.) The parties agreed to waive the time for sentencing until the conclusion of Adamson's testimony in all of the cases referred to in the agreement and Exhibits A and B attached to it. (J.A. at 197.)

Adamson was assisted by three attorneys, who reviewed the plea agreement and discussed it and the case with him. At the change-of-plea hearing, Adamson told the trial court that he had 4 years of college. (J.A. at 17.) Judge Birdsall went over every paragraph of the plea with Adamson, asking him whether he had any questions about any provision. When the judge asked Adamson whether he understood the meaning of paragraphs 4 and 5 of the plea agreement, and whether he understood that if the plea agreement were declared null and void, he would be subject to the original charge and a possible penalty of death, Adamson replied that he did understand that. (J.A. at 21-23.) Adamson also indicated that he

understood, according to paragraph 15 of the plea agreement, that if the agreement became null and void, that he would face the charge of open murder. (J.A. at 28-29.) All three of Adamson's attorneys signed the agreement, beneath the paragraph that stated they had discussed the case and the plea agreement with Adamson, had advised him of his rights and the conditions of the plea, and concurred in his decision to enter the plea. (J.A. at 32, 214.) Adamson stated that he was satisfied with the representation of all three attorneys. (J.A. at 35-36.) Judge Birdsall accepted the plea, but deferred sentencing pursuant to the provisions of the plea agreement. (J.A. at 33, 35, 41.)

Thereafter Adamson testified against Max Dunlap and James Robison about their involvement in the murder of Don Bolles. They were both convicted of first-degree murder and both were sentenced to death. When that trial was finished, Adamson was sentenced. (J.A. at 46-49.)

The Reversals

On February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison. State v. Dunlap, 125 Ariz. 104, 608 P.2d 41; State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980). As the state prepared to retry them, Stanley Patchell, an assistant attorney general, called William Feldhacker on April 2 to discuss Adamson's availability for interviews in preparation for his testimony. The next day Mr. Feldhacker wrote Mr. Patchell a letter informing him that he and his partner had met with Adamson, and that Adamson believed he had

fully complied with and completed the plea agreement, that he had no further obligations, and that he would not testify at the retrial. (J.A. at 200-04.) Through his attorney, Adamson acknowledged that he knew the Attorney General would not share his belief that he had completed his obligations under the plea agreement, that the Attorney General might consider the plea agreement breached and that if the agreement were breached the state could prosecute him for the killing of Donald Bolles on a first-degree murder charge. (J.A. at 201.) Adamson then went on to list his new "demands" to which the state would have to accede if it expected his testimony at a retrial. (J.A. at 201-03.)

The Prosecutor's Response

April 9, 1980, William J. Schafer, an assistant attorney general, replied to Adamson's letter. He stated that the plea agreement was still in effect and that the state had the right to call upon Adamson for testimony and interviews. The second paragraph of the letter said that the state had called upon Adamson, through his attorneys, for an interview regarding his testimony at the retrial but that Adamson's attorneys refused to allow him to be interviewed. (J.A. at 205.)

That refusal to be interviewed, stated the letter, was a violation of the plea agreement and, because of that, the state could, as the plea agreement provided, refile the original murder charge, which would subject Adamson to the death penalty.

Hearings in Preparation for Retrial

The retrial of Dunlap and Robison was set for May 1980. At a series of hearings in preparation for the retrial, the state attempted to compel Adamson, pursuant to the plea agreement, to answer questions. At the initial hearing, April 18, 1980, Judge Myers ordered Adamson to answer a question but Adamson's attorney objected and Adamson refused to answer and claimed the protection of the Fifth Amendment. He argued that because the state had informed him that they considered his refusal to testify a breach of the plea agreement, he could not now risk incriminating himself by testifying. Judge Myers upheld Adamson's invocation of the Fifth Amendment. (J.A. at 50-53.)

The state then filed a motion to compel testimony pursuant to the plea agreement. (J.A. at 54-55.) At the hearing on that motion, the prosecutor argued that Adamson was obligated, pursuant to the terms of the plea agreement, to cooperate in preparation for a retrial; and the prosecutor asked the court to construe the plea agreement to determine whether Adamson was in violation of it. (J.A. at 56-57.) Although Judge Myers did not construe the plea agreement, he denied the state's motion to compel Adamson to testify. (J.A. at 58.) At that same hearing, which had been scheduled as a deposition of Adamson noticed by Robison's attorney, Adamson invoked the Fifth Amendment and refused to testify. (J.A. at 58-59.) At that same deposition, when an assistant attorney general asked Adamson, in the words of the plea agreement, whether he would invoke the Fifth Amendment and refuse to give any testimony, whether under oath or not, at all interviews,

depositions, hearings and trials, A lamson, after consultation with his attorneys, responded that he would refuse to testify. (J.A. at 59-60.)

With the retrial of Dunlap and Robison just a few weeks off the state tried once again to obtain Adamson's cooperation but he refused. His attorney objected that Adamson had fulfilled the plea agreement and, moreover, that no one had jurisdiction over the plea agreement or John Harvey Adamson and that the superior court could not rule on anything in the plea agreement. (J.A. at 61.)

The state then filed a special action in the Arizona Supreme Court, asking them to review Judge Myers' refusal to compel testimony pursuant to the plea agreement, but that court declined to accept jurisdiction. (J.A. at 111.)

The state filed an information on May 8, 1980, charging John Harvey Adamson with open murder in the killing of Don Bolles. (J.A. at 62.) The superior court issued a warrant pursuant to that information and Adamson moved to quash the warrant and strike the information. (Hill, CR 3, Exhibit J.) After a hearing on May 12 Superior Court Judge French denied Adamson's motions and refused to halt the prosecution. (J.A. at 111.)

Adamson then filed a petition for special action in the Arizona Supreme Court. He argued that he already stood convicted of second-degree murder under a plea agreement and was serving his sentence, and that allowing the prosecution upon the greater charge would violate double jeopardy. (J.A. at 63-66.) The state responded that Adamson had breached his agreement with the state and because of that breach he had waived any claim to jeopardy on reinstatement of the original charge. (J.A. at 74-77.)

The Arizona Supreme Court set a hearing date of May 28 for Adamson's special action. The state then filed another motion in superior court seeking to push the date for the Dunlap-Robison retrial back further than May 21, but the trial court denied the motion. On the next day, May 16, Adamson moved to dismiss his own special action in the supreme court. He stated that an adequate record had been made in the lower courts to establish his position about double jeopardy and that he could proceed through the normal channels of appeal if the state continued with the prosecution. (J.A. at 80-81.) The state opposed the motion, pointing out that Adamson had filed it only after Judge Myers, the day before, had refused to grant the state a continuance of the rapidly approaching retrial of Dunlap and Robison. (J.A. at 83.) Adamson's counsel replied that he was not asking any court to determine any issue about the plea agreement, and did not intend by his allegations in the special action to raise the interpretation of the plea agreement. (J.A. at 86-87.)

The supreme court did not dismiss Adamson's special action and on May 28, 1980, had a hearing to determine whether the court would take jurisdiction over the matter. At the hearing Adamson's counsel made it plain that he did not want the court to construe the plea agreement or determine whether Adamson breached it. He wanted the court to focus only upon his double jeopardy argument, but the court refused to limit the hearing and both counsel argued the merits of the plea agreement and Adamson's breach. (J.A. at 88-93.) Assistant Attorney General William J. Schafer asked the supreme court to take jurisdiction to decide a single issue, from which all other issues flowed, whether the plea agreement obligated Adamson to

testify against Dunlap and Robison. Schafer asserted that it did and that Adamson had breached it when he refused to testify. (J.A. at 94-95.)

The next day, May 29, the Arizona Supreme Court issued its opinion holding that the terms of the plea agreement required Adamson to testify at a retrial, that he had breached the agreement, and that the state could proceed with the prosecution for first-degree murder. That court vacated his conviction and sentence for second-degree murder. (J.A. at 115.) But Adamson still refused to testify and the state moved to dismiss the case against Dunlap and Robison, now set for June 2.2 Based upon the state's position that it could not proceed, the superior court granted the motion and dismissed the case against Dunlap and Robison without prejudice against refiling in the future. (Petitioners' answering brief in Hill, at 8.)

Adamson then took his case to federal court, filing a petition for writ of habeas corpus arguing that his obligations under the plea agreement terminated when he was sentenced and that he had not breached the agreement. (Hill, CR 3, supplemental petition, at 3; CR 4, memo in support of supplemental petition, at 5-10.) The state moved to dismiss the petition, asserting that whether Adamson breached the plea agreement was a state question, not a federal one, and that the double jeopardy clause did not prevent his trial upon the original charge. (Hill, CR 8, at 3, 5-7.) District Judge Muecke heard oral argument on September 26, 1980, and on the same day issued an order dismissing the petition as "legally frivolous."

^{2.} The Arizona Supreme Court had stayed the trial proceedings until disposition of the special action.

(J.A. at 133-37.) Adamson moved to amend the findings and the judgment; Judge Muecke denied those motions in an order characterizing the interpretation of a plea agreement as a matter of state law. (J.A. at 138-39.) Adamson appealed the dismissal to the Ninth Circuit Court of Appeals. (J.A. at 154.)

In its order of April 24, 1981, the Ninth Circuit directed the parties to address what effect this Court's decision in Sumner v. Mata, 449 U.S. 539 (1981), would have on that court's review of the Arizona Supreme Court's finding that Adamson was required under the plea agreement to testify at the retrial of Dunlap and Robison. The Ninth Circuit also asked the parties to discuss what effect various provisions of 28 U.S.C. § 2254(d) would have on its review of the Arizona Supreme Court's findings. (J.A. at 155.)

Adamson argued that the Arizona Supreme Court's interpretation of the plea agreement was erroneous, and that he had not breached it. He did not argue that he did not understand that if he breached the plea agreement, he could be prosecuted for first-degree murder.

In a memorandum decision, the Ninth Circuit rejected his contention, saying that the interpretation of the plea agreement reached by the Arizona Supreme Court and the federal district court was "eminently reasonable." The Ninth Circuit accorded a presumption of correctness to the state court's findings and held that Adamson had not overcome it. (J.A. at 156-63.) This Court denied certiorari. Adamson v. Hill, 455 U.S. 992 (1982).

The Second Trial

While the previous proceedings were in progress, the state tried Adamson for first-degree murder. He was convicted and, after an aggravation/mitigation hearing, the trial court sentenced him to death. The Arizona Supreme Court affirmed the conviction and the sentence. State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 464 U.S. 865 (1983).

Adamson then sought federal habeas relief for a second time in December 1983, but he did not argue the double jeopardy issue in his petition. (Ricketts, CR 1, 16.) District Judge Muecke denied relief and Adamson appealed. (Ricketts, CR 24, 29.) In his brief to the Ninth Circuit Adamson did not raise the double jeopardy issue, and in its panel decision affirming the district court's dismissal of the petition, the Ninth Circuit noted, as part of the factual background of the case, that it had decided the double jeopardy issue against Adamson in 1981. Adamson v. Ricketts, 758 F.2d 441, 444-45 n.3.

The Ninth Circuit granted Adamson's request for rehearing en banc. By order of July 12, 1985, it instructed the parties to argue two issues: (1) whether the double jeopardy clause barred his conviction and sentence of death following his conviction and sentence pursuant to the plea agreement; (2) whether the application of the death penalty was arbitrary on the grounds that the state sought it and the sentencing judge imposed it vindictively. (J.A. at 174.) Adamson then argued in his supplemental brief on rehearing en banc that it was "unrebutted that Mr. Adamson did not believe he was waiving his rights, did

not intend to waive his rights, " (Adamson's Supplemental Brief on Rehearing En Banc, at 16.) Judge Brunetti, dissenting from the en banc court's reversal, noted that Adamson did not raise the double jeopardy issue in the district court or on his appeal from the district court, but for the first time in the habeas proceeding in his supplemental brief on rehearing en banc. Adamson v. Ricketts, 789 F.2d 722, 735 n.1 (9th Cir., en banc, 1986). (J.A. at 207.)

Divided 7-4, the en banc court held that Adamson did not waive the protection of double jeopardy either by the terms of the plea agreement or by his deliberate course of conduct. (J.A. at 182-93.) The Ninth Circuit denied petitioners' request for a rehearing June 6, 1986, and the petition for certiorari was docketed in this Court July 3.

SUMMARY OF ARGUMENT

Interpretation of a plea agreement in a state criminal proceeding is a question of state law. When the Arizona Supreme Court determined the obligations of the parties, and concluded that Adamson had breached the agreement and that the state might proceed with the prosecution for first-degree murder, those findings of historical fact were entitled to a presumption of correctness under 28 U.S.C. § 2254(d). The Ninth Circuit could not set them aside unless they were not fairly supported by the record, and the record abundantly sustains them.

Even if the Arizona Supreme Court's conclusions were not entitled to a presumption of correctness, they are still the proper interpretation of the plea agreement.

The language of the plea agreement made it clear to Adamson that, if he violated it, he faced reprosecution on the original charge and the possible death penalty. Insertion of the phrase "double jeopardy" in the plea agreement would not have added anything that was not already there and understood by all the parties. This Court has never required an express waiver of double jeopardy protection, but has always examined the role of the defendant in bringing about a retrial.

By his deliberate, defiant actions, Adamson breached the plea agreement with full knowledge of the consequences. Because he was responsible for the nullification of the agreement, nothing in the double jeopardy clause prevented his trial for first-degree murder.

ARGUMENTS

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INTERPRETATION OF A PLEA AGREEMENT IN A STATE CRIMINAL PROCEEDING IS A STATE QUESTION, AND THE ARIZONA SUPREME COURT'S FINDINGS WERE ENTITLED TO A PRESUMPTION OF CORRECTNESS AND ARE AMPLY SUSTAINED BY THE RECORD.

This issue in this case is a very simple one. It involves the meaning of a plea agreement and whether John Harvey Adamson breached it. Judge Kennedy noted in his separate dissent:

In the context of the plea bargain before us, the double jeopardy analysis of the court is artificial. It

gives the defendant a windfall of the kind that results when a court imposes a constitutional interpretation of new dimensions in what should have been a simple case of the making of a bargain and the failure to keep it. I dissent.

(J.A. at 241.) Also dissenting, Judge Brunetti stated that the majority had simply misinterpreted the plea agreement. Judge Kennedy noted that the critical issue in this case was whether Adamson's acts were in breach of the agreement. That issue, he correctly observed, was one of state law, nothing more. It depended upon primary and historical facts which the Ninth Circuit had no authority to determine and, Judge Kennedy went on to say, even if the Ninth Circuit did have the authority to review the state supreme court's interpretation of the plea, there was ample support for that court's finding that Adamson breached the agreement. (J.A. at 240-41.)

This Court has often said that states are the ultimate expositors of their laws, and that federal courts are bound by those constructions except in extreme circumstances. Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975). The Ninth Circuit has also recognized that it is bound by state court construction of state statutes. Knapp v. Cardwell, 667 F.2d 1253, 1260, cert. denied, 459 U.S. 1055 (1982). The interpretation of a state plea bargain is a state question. When the provisions of the agreement contain a clear forfeiture of protection against reprosecution in case of a breach, and the state supreme court determines that the defendant understood that, and that he breached the agreement, those factual findings are entitled to the presumption of correctness by a federal appellate court unless they are not fairly supported by the record. The federal

court's disagreement with the state court's interpretation does not transform the determination of the rights of the parties under that agreement into a federal question.

This Court has before it a plea agreement, arrived at after a bargaining process, and after the parties had the opportunity to examine the rights forfeited and the benefits obtained. Whether Adamson forfeited double jeopardy protection if he violated the agreement depended upon the provisions of that agreement, which he entered into with the full assistance of three attorneys. This Court does not have before it an illiterate defendant who had no opportunity to consult with counsel, and no chance to consider the rights he was foregoing weighed against the benefits he would receive. Adamson informed the trial court that he had 4 years of college, that he was satisfied with the representation of all three counsel, and that he understood each of the provisions that Judge Birdsall went over with him in detail before Birdsall accepted the plea.

The Arizona Supreme Court, after full briefing and a hearing, found that Adamson understood the terms of the plea agreement and knew he would be subject to prosecution for first-degree murder and a possible death sentence if he refused to testify. Paragraphs 5 and 15 of the agreement, and common sense, make it evident that Adamson knew what would happen when he refused. Those paragraphs provide that if he refused to testify, or at anytime testified untruthfully, the entire agreement would be null and void and the original charge would be automatically reinstated. Paragraph 15 reemphasized this, in part, by stating that if the agreement became null and void, then the parties would be returned to the positions they were in before the agreement.

The question is not, as the Ninth Circuit majority erroneously conceived it, whether Adamson subjectively believed he was breaching the agreement. The question is whether he understood when he entered into the plea agreement that, if he breached it, the original charges would be automatically reinstated and the parties would be in the same positions they occupied before the plea was concluded. The language of those provisions is unmistakably clear and the Ninth Circuit's strained attempts to circumvent that language, and to read it out of context, are unpersuasive.

Petitioners have already pointed out that the Ninth Circuit's treatment of the Arizona Supreme Court's findings in 1981 contrasts, as night with day, the majority's treatment of the same findings under the same plea agreement in 1986. In Adamson v. Hill, supra, the Ninth Circuit, as it should have, accorded a presumption of correctness to the Arizona Supreme Court's findings about the meaning of the terms of the agreement and Adamson's breach of them. That court at that time held that Adamson was not able to overcome the presumption of correctness. (J.A. at 159-61.) As petitioners have noted, Adamson argued that the Arizona Supreme Court's interpretation of the agreement was erroneous, not that he did not understand that if he violated the agreement, he could be prosecuted for first-degree murder.

In 1986, looking at the same plea agreement, the Ninth Circuit majority concluded that, although paragraph 5 permitted the state to reinstitute the original charges if the agreement became null and void, that actually meant nothing because it did not say that Adamson was waiving

a defense of double jeopardy. (J.A. at 188-89.) Of course, that same paragraph refers to prosecution on the charge of first-degree murder and, upon conviction of that charge, a possible death penalty. (J.A. at 196.) It simply defies common sense to say that all the State of Arizona was bargaining for was the right to file a piece of paper charging Adamson with first-degree murder, but, if it did so, Adamson retained a perfect defense of double jeopardy.

Such reasoning is particularly unfathomable when one reads Adamson's letter of April 3, 1980, to the state. Judge Brunetti perceptively observed that the wording of that letter established that the statements were communications from John Harvey Adamson through his attorney to the prosecution. (J.A. at 223.) Almost every paragraph begins with "John Harvey Adamson" One need only look at paragraph three to realize that Adamson knew the plea agreement provided that the state could prosecute him on the original first-degree charge if he violated it. He even said in that paragraph that the Attorney General might not agree that he had completed his obligations under the plea and that if that office was successful in withdrawing the plea from him, he could be prosecuted for the killing of Donald Bolles on a firstdegree murder charge. (J.A. at 201.) The last sentence of the penultimate paragraph is also very significant. There Adamson stated that it was his position that, without some type of stipulation, a superior court judge would not have jurisdiction to change or withdraw his plea agreement or sentence. (J.A. at 203-04.) In one breath Adamson recognized that if the state was successful in withdrawing the plea agreement, he could be prosecuted on a charge of first-degree murder and, in the next, he

stated his intent to prevent the superior court from construing the agreement to determine whether he was violating it.

Petitioners have demonstrated in the statement of the case that Adamson continually objected to the superior court's construing the plea agreement, and even tried to withdraw his special action before the Arizona Supreme Court when he found that they were going to construe the agreement. When one considers these facts, it is impossible to agree with the majority opinion that Adamson did not realize the consequences of a breach, or that he simply took a "reasonable" position in asserting his interpretation of the plea agreement. As the dissent points out, Adamson never described his position as "reasonable." (J.A. at 223.)

When the majority opinion refers to Adamson's actions as reasonable because Judge Myers upheld his invocation of the Fifth Amendment in a pretrial hearing, it does so without recognizing that Adamson's counsel objected to construing the plea agreement to determine whether Adamson had violated it. Myers' upholding Adamson's invocation of the Fifth Amendment was totally meaningless without interpreting the plea agreement because only a construction of that agreement could determine whether Adamson had the right to refuse to testify. In that series of pretrial hearings Adamson pursued exactly the course of action that he told the state he would in his letter of April 3, 1980—he refused to cooperate, and objected to the trial court's interpreting the plea agreement.

Ignoring the other clear provisions of the plea agreement, the majority of the Ninth Circuit focused only upon paragraph 8, which provided for delayed sentencing. But, as the Arizona Supreme Court found in 1980, the Ninth Circuit in 1981, and the four dissenters in 1986, that merely provided for a ministerial act of sentencing; it did not signal the end of Adamson's obligations under the plea agreement. Paragraph 8 does not say that sentencing shall be synonymous with the termination of all of Adamson's obligations under the plea agreement. Paragraph 4 required Adamson to testify fully and completely in any court, when requested by proper authorities, against any and all parties involved in the murder of Don Bolles. (J.A. at 196.) Paragraph 5 required him to testify truthfully at all times, whether under oath or not, to the crimes mentioned in the agreement. That included all interviews, depositions, hearings and trials. (J.A. at 196.) Repeated use of the plural in this series of nouns was no coincidence. A modicum of common sense makes it plain that the state was not bargaining for testimony at one trial, then, upon reversal, would have to renegotiate with Adamson for future testimony.

Having considered all the provisions of the plea agreement, the Arizona Supreme Court held:

Although the plea agreement does not specifically spell out the duration of petitioner's obligations, it does contemplate full compliance with the requests of the state until the objectives have been accomplished. This is stated in the broadest of terms. We have no hesitation in holding that the plea agreement contemplates availability of petitioner's testimony whether at trial or retrial after reversal.

(J.A. at 112.) That court made that finding after having considered the plea agreement, the transcript of the change-of-plea hearing, and after having heard oral argument May 28, 1980.

Adamson will probably rely here, as he did below, upon a colloquy at sentencing December 7, 1978. That colloquy is reproduced in full in the Arizona Supreme Court opinion. (J.A. at 113.) Immediately before Judge Birdsall sentenced Adamson, William J. Schafer, assistant attorney general, stated that he wanted the record to show that he had discussed with defense counsel that it might be necessary to bring back Adamson after sentencing for further testimony. Mr. Feldhacker and Mr. Martin, Adamson's counsel, stated that that was correct. Before the Arizona Supreme Court and in the district court proceedings in 1980 in Adamson v. Hill, defense counsel argued that that referred merely to the Ashford Plumbing case and not the Bolles murder. The Ninth Circuit accepted that in 1981 and said that even if that colloquy were so interpreted, it would cast no doubt on the accuracy of the Arizona Supreme Court's decision. (J.A. at 160.)

It is evident that Adamson at sentencing in 1978 did not say that he believed he had fulfilled all his obligations under the plea agreement, but, out of the goodness of his heart, he would testify after sentencing. As Judge Brunetti noted in his dissent, even if one accepts the assertion that the testimony alluded to was the Ashford case, defense counsel's admission at sentencing that Adamson would come back to testify was not an addition or amendment to the plea agreement, but was one of Adamson's obligations required by the plea agreement. The Ashford case was one

of the cases included in the exhibits to the plea agreement. (J.A. at 226-27.) As Judge Brunetti observed:

Adamson can not assert a reservation for refusal to further testify after sentencing in the Robison and Dunlap Bolles murder cases, and at the same time acknowledge an obligation to testify in the Ashford case after sentencing. The plea agreement makes no such distinctions.

(J.A. at 228.) It really makes no difference to which case defense counsel was referring. The important thing is that he admitted Adamson's continuing obligation under the plea agreement to testify after sentencing.

Petitioners must correct a glaring misstatement of fact in the majority opinion. The majority says that immediately after the Arizona Supreme Court told Adamson he was obliged under the plea agreement to testify, he agreed to do so. (J.A. at 190.) What they do not say is that he was willing to do so only if he could retain the same sentence he had received under the plea agreement. The prosecutor told him that he would consider a sentence of life and nothing else. When Adamson refused that, the state prepared to try him on the original charge of murder. The state has not negotiated with him since. (Ricketts, CR 23, Answer to Amended Supplemental Petition for Habeas Corpus, at 8.)

Adamson argued before the Ninth Circuit in 1981 that, if that court rejected his appeal, it should allow him to "cure" his breach by returning him to the status quo prior to his refusal to testify. The Ninth Circuit said:

In anticipation that this appeal would fail, Adamson suggests that this Court allow him to "cure" his breach of the plea agreement by returning him to the

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status quo prior to his refusal to testify. Compliance with his request would reduce the meaning of the various state and federal decisions in this case to the status of advisory opinions and render meaningless the trial resulting in his murder conviction. In his written refusal to testify and list of demands, Adamson acknowledged that he ran the risk of reprosecution for first-degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble.

(J.A. at 161.) To conclude otherwise, as Judge Brunetti noted in dissent, is to make nonsense of the plea agreement, and to grant Adamson, the breaching party, the unilateral right to defeat the clear enforcement mechanism of the agreement by allowing him to decide if he will choose to cooperate on his terms after he has breached the agreement and a court has told him that he has breached. (J.A. at 232.) He realized and admitted that risk in his letter of April 3, 1980.

In 1981 the Ninth Circuit decided this case correctly, giving, as it should have, the presumption of correctness to the state court's interpretation of the plea agreement and Adamson's actions breaching it. When one reads the agreement, applies common sense to the obvious objectives contemplated by it, the benefits received by Adamson, his breach of the agreement, his announced intent to prevent anyone from interpreting the agreement, and his subsequent course of conduct resisting interpretation of the agreement, it is incredible that the majority in 1986 came to the opposite conclusion.

BECAUSE ADAMSON'S DELIBERATE ACTIONS RESULTED IN HIS REPROSECUTION FOR FIRST-DEGREE MURDER, THE DOUBLE JEOPARDY CLAUSE DID NOT PREVENT THE PROSECUTION.

This Court does not have before it a defendant who chose to proceed through the trial process to conviction or acquittal of first-degree murder. Adamson could have done that, but he chose to enter into a plea bargain and not to permit a jury to determine his guilt or innocence of first-degree murder. It follows as an inevitable corollary that, if the Arizona Supreme Court's findings about the plea agreement and his breach of it are fairly supported by the record, Adamson was responsible for the renewed prosecution on the first-degree murder charge and cannot complain about a violation of double jeopardy.

This Court has said that double jeopardy protection is not the same kind of constitutional right as, for example, the right to counsel, and has implicitly rejected the contention that it must be expressly waived. United States v. Dinitz, 424 U.S. 600, 609 n.11 (1976). Long ago, this Court held that a defendant who successfully appealed his conviction had no double jeopardy objection because his action in appealing the conviction necessitated a new trial. United States v. Ball, 163 U.S. 662, 671-72 (1896). Nobody had to explain double jeopardy to Ball before he appealed, or forewarn him he could be retried if he was successful. Similarly, a defendant's motion for a mistrial, so long as it is not provoked by intentional prosecutorial misconduct, is no obstacle to a new trial whether or not the defendant had explained to him the meaning of double jeopardy.

United States v. Dinitz, supra; United States v. Jorn, 400 U.S. 470, 485 (1971). These cases, like Ball, focus upon the defendant's power to choose a course of action, either to let the issue of guilt go to the jury, or to take it from the jury.

In Santobello v. New York, 404 U.S. 257, 263 n.2 (1971), this Court said that, if the trial court permitted Santobello to withdraw his plea, the original charges could be refiled. There was no discussion about an express waiver of double jeopardy.

The Ninth Circuit has never required an express waiver of double jeopardy when the defendant successfully has a plea set aside. *United States v. Barker*, 681 F.2d 589, 590-91 (9th Cir. 1982).

When the defendant has been responsible for prosecution on the greater charge, other circuits have found no constitutional violation even absent a waiver in the record. United States ex rel. Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971); Klobuchir v. Commonwealth of Pennsylvania, 639 F.2d 966 (3d Cir. 1981); Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979); United States v. Anderson, 514 F.2d 583 (7th Cir. 1975); United States v. Williams, 534 F.2d 119 (8th Cir. 1976), cert. denied, 429 U.S. 894 (1976); Ward v. Page, 424 F.2d 491 (10th Cir. 1970), cert. denied, 400 U.S. 917 (1970).

In Jeffers v. United States, 432 U.S. 137, 152 (1977), this Court saw no double jeopardy violation where Jeffers elected to be tried separately on two charges although one was a lesser-included of the other. Again, the focus was upon the defendant's role in bringing about the result. Judge Brunetti in his dissent aptly noted that Adamson's

case essentially is analogous to Jeffers. The only difference is that in Jeffers a second prosecution on the greater offense was a certainty; for Adamson it was contingent upon his breach of the plea agreement, and he breached it. (J.A. at 218-19.)

Probably the clearest expression about when double jeopardy affords no protection is *United States v. Scott*, 437 U.S. 82 (1978). Concluding that Scott could be retried on two counts that the trial court dismissed at Scott's reguest before the case went to the jury, Chief Justice Rehnquist said:

[Double jeopardy] is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecuton.

437 U.S. at 96. Specifically declining to adopt a waiver analysis, this Court said:

We do not thereby adopt the doctrine of "waiver" of double jeopardy rejected in *Greene*. Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 100.

When Adamson breached the plea agreement, he lost the protection of the double jeopardy clause by his voluntarily chosen course of conduct with full understanding of the consequences even though the agreement did not use the words "double jeopardy." The important thing for a defendant to know in such a situation is not the technical legal term that applies to his actions, but the consequences that will flow from his actions. When Adamson knowingly agreed that if he breached the agreement, the original charge would be reinstated, he knew, without saying more, that he agreed to give up his double jeopardy rights. More words would not have made the consequences any clearer.

CONCLUSION

John Harvey Adamson did not want a jury to determine his guilt or innocence on the charge of first-degree murder in 1977, and he took that decision from the jury by entering a plea agreement. Counseled by three attorneys, and thoroughly questioned by the trial court about the meaning of every provision of that agreement, Adamson knew the consequences if he breached it. In his letter of April 3, 1980, he admitted that he knew what the consequences were if the state was successful in having the plea agreement voided. The Arizona Supreme Court did not err in its interpretation of the plea agreement, nor in its finding that John Harvey Adamson breached it. Adamson took a gamble trying to force additional concessions from the state. Because he did that with full knowledge of the consequences if he lost, double jeopardy affords him no protection.

This Court should reverse the Ninth Circuit's en banc decision.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF ARIZONA, PETITIONER

22

JOHN HARVEY ADAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the prosecution of a defendant who voluntarily breaches the terms of a plea agreement that disposed of the original charges against him.

TABLE OF CONTENTS

	Page
Interest of the United States	
Statement	
Summary of argument	9
Argument:	
Prosecution of a defendant who breaches a agreement is not barred by the Double Jeop Clause	ardy
A. The Double Jeopardy Clause does not relied defendant of the consequences of his volume actions	itary
B. The court of appeals' holding is inconsist with the policies of the Double Jeopardy Cla	
Conclusion	28
TABLE OF AUTHORITIES	
Cases:	
Adamson v. Ricketts, 758 F.2d 441	
Adamson v. Superior Court, 125 Ariz. 579,	
P.2d 932 Arizona v. Washington, 434 U.S. 497	3, 5, 20
Blackledge V. Allison, 431 U.S. 63	
Brown V. Ohio, 432 U.S. 161	
Burks v. United States, 437 U.S. 1	
Garrett v. United States, No. 83-1842 (Jun	ne 3,
1985)	17
Green v. United States, 355 U.S. 1841	
Hawk v. Berkemer, 610 F.2d 445	
Jeffers v. United States, 432 U.S. 137	
Johnson v. Zerbst, 304 U.S. 458	
U.S. 294	17, 22, 23
Klobuchir v. Pennsylvania, 639 F.2d 966, cert	
nied, 454 U.S. 1031	
Lee v. United States, 432 U.S. 23	

Cas	es—Continued:	Page
	Lowery v. Estelle, 696 F.2d 333	15
	Mabry V. Johnson, 467 U.S. 504	19, 24
	Menna v. New York, 423 U.S. 61	. 17
	Ohio v. Johnson, 467 U.S. 49311, 12, 15, 22,	23, 25
	Sanabria v. United States, 437 U.S. 54	
	Santobello v. New York, 404 U.S. 257	24
	State V. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, 464 U.S. 865	2, 6
	State v. Dunlap, 125 Ariz. 104, 608 P.2d 41	. 4
	State v. Robison, 125 Ariz. 107, 608 P.2d 44	4
	Taylor V. United States, 414 U.S. 17	18
	Tibbs v. Florida, 457 U.S. 31	
	United States v. Anderson, 514 F.2d 583	*
	United States v. Arnett, 628 F.2d 1162	19
	United States v. Baldacchino, 762 F.2d 170	19
	United States v. Ball, 163 U.S. 662	
	United States v. Barker, 681 F.2d 589	15
	United States v. Calabrese, 645 F.2d 1379, cert. de-	
	nied, 451 U.S. 1018	21
	United States v. Carrillo, 709 F.2d 35	19
	United States v. Dinitz, 424 U.S. 60010, 14, 16, 21,	22, 23
	United States v. Gogarty, 533 F.2d 93	19
	United States v. Jerry, 487 F.2d 600	15
	United States v. Johnson, 537 F.2d 1170	15
	United States v. Jorn, 400 U.S. 47014,	16, 20
	United States v. McIntosh, 612 F.2d 835	24
	United States v. Myles, 430 F. Supp. 98, aff'd, 569	
	F.2d 161	15
	United States v. Scott, 437 U.S. 82	16, 17,
		21, 22
		21
	United States v. Tateo, 377 U.S. 46312, 13, 14,	
	United States v. Verusio, No. 85-1690 (7th Cir.	,
	Oct. 9, 1986)	21
	United States v. Whitley, 759 F.2d 327, cert. de-	
	nied, No. 84-6980 (Oct. 7, 1985)	15
	United States ex rel. Williams v. McMann, 436	
	F.2d 103, cert. denied, 402 U.S. 946	15, 24
	Ward v. Page, 424 F.2d 491, cert. denied, 400 U.S.	
	917	15

Constitution and statute:	Page
U.S. Const. Amend. V (Double Jeopa	rdy Clause) passin
28 U.S.C. 2254	
Ariz. Rev. Stat. §§ 13-451 to 13-452.	

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STATE OF ARIZONA, PETITIONER

22.

JOHN HARVEY ADAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves a claim that the Double Jeopardy Clause bars reprosecution when the defendant voluntarily breaches the terms of a plea agreement. Because plea agreements play an important role in the federal criminal justice system, and because the Court's decision here is likely to affect federal criminal prosecutions, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. On June 2, 1976, Donald Bolles, a reporter for the Arizona Republic, was critically injured when a powerful bomb exploded in his car. Bolles survived for 11 days, during which three of his limbs were amputated in an attempt to save his life. He died on June 13, 1976. State v. Adamson (Adamson II), 136 Ariz. 250, 253, 665 P.2d 972, 975, cert. denied, 464 U.S. 865 (1983).

The evidence that was produced at respondent's trial established that respondent placed the bomb in Bolles' car and lured Bolles to the spot where it was detonated. Respondent received \$10,000 for his efforts. Bolles had been targeted, respondent told a companion, because he "was giving people a lot of hard times and stepping on people's toes." Adamson II, 136 Ariz. at 253-254, 665 P.2d at 975-976.

2. Respondent was indicted on the state criminal charge of "open murder" for his role in the Bolles killing. See Ariz. Rev. Ann. Stat. §§ 13-451 and 13-452 (repealed). Prior to jury selection, however, respondent and the State entered into a plea agreement (Pet. App. A36-A46, A69). The State agreed to amend the open murder charge to one of second degree murder; petitioner was to plead guilty to that charge and receive a sentence of between 48 and 49 years' imprisonment.1 Respondent also received immunity from prosecution for certain other crimes. Id. at A36-A38, A40-A41. In return, respondent agreed "to testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder of Don Bolles" (id. at A38), and to "testify fully and completely at all times, whether under oath or not," at "all interviews, depositions, hearings and trials" (id. at A39). The agreement also provided

that, "[s]hould [respondent] refuse to testify or should he at any time testify untruthfully * * * then this entire agreement is null and void and the original charge will be automatically reinstated. [Respondent] will be subject to the charge of Open Murder, and if found guilty of First Degree Murder to the penalty of death or life imprisonment." Id. at A39-A40. Similarly, the State and respondent agreed that "[i]n the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement" (id. at A44).

Before accepting the plea, the trial judge "in detail reviewed each paragraph of the plea agreement with [respondent]," receiving respondent's assurance that he understood the meaning of each provision (Pet. App. A71; see id. at A68). Among other things, the trial judge informed respondent that should he "refuse to testify * * * he would be subject to the charge of open murder"; respondent replied that "he understood what would happen if for any reason the agreement became null and void and the open murder charges were reinstated" (id. at A72). The trial judge ultimately made the finding that the plea was entered "voluntarily and intelligently with full understanding." Adamson v. Superior Court (Adamson I), 125 Ariz. 579, 583, 611 P.2d 932, 936 (1980). Respondent subsequently testified against Max Dunlap and James Robison on charges growing out of the Bolles 'murder. After Dunlap and Robison were convicted, respondent was sentenced in accordance with the terms of the plea agreement. Pet. App. A5.2

¹ Under that sentence, respondent actually would be incarcerated for 20 years and two months.

² At sentencing, the prosecutor stated that he "wish[ed] the record would show that it has been discussed with counsel,

3. In February 1980, the convictions of Dunlap and Robison were reversed by the Arizona Supreme Court and the cases were remanded for new trials. State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980); State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980). When the State sought to interview respondent to prepare for the retrials, however, respondent refused to cooperate. On April 3, 1980, he informed the State that he believed he had fulfilled his obligations under the plea agreement, although his attorney recognized that the State "may feel that [respondent] has not completed his obligations" and "may attempt to withdraw that plea agreement from him"; respondent also acknowledged through his attorney that "if the State were successful in doing so, [respondent] may be prosecuted for the killing of Donald Bolles on a first degree murder charge." Pet. App. A48-A50. Respondent nevertheless stated that he would testify in a retrial of Dunlap or Robison only "upon the offer of further consideration by the State of Arizona" (id. at A49), including, among other things, his release from custody (id. at A50-A53).

On April 9, 1980, the State attempted to interview respondent. When he refused to cooperate, the State indicated that, in its view, his action amounted to a violation of the plea agreement and that the State was free to prosecute him for first degree murder. Pet. App. A56-A57. The State accordingly scheduled respondent's deposition "in an effort to resolve this question" (id. at A57). Respondent refused to testify in the pretrial proceedings, however,

and the trial court refused to compel his testimony. The Arizona Supreme Court declined to accept jurisdiction of the State's Petition for a Special Action to challenge the trial court's ruling. See Adamson I,

125 Ariz. at 582, 611 P.2d at 935.

On May 8, 1980, the State accordingly filed a new information charging respondent with first degree murder. The trial court denied respondent's motion to dismiss the information on double jeopardy grounds. On respondent's Petition for a Special Action, the Arizona Supreme Court affirmed. The court first held, with "no hesitation," that the plea agreement "contemplates the availability of [respondent's] testimony whether at trial or retrial after reversal." Adamson I, 125 Ariz. at 583, 611 P.2d at 936. Having concluded that respondent violated the terms of the plea agreement, the court found it easy to dispose of respondent's double jeopardy argument, since the agreement "by its very terms waives the defense of double jeopardy if the agreement is violated" (125 Ariz. at 584, 611 P.2d at 937).

Respondent then sought habeas corpus relief pursuant to 28 U.S.C. 2254, arguing that the state court had erred in its interpretation of the plea agreement (Pet. App. C7). The district court dismissed the petition. The court of appeals affirmed (id. at C1-C12; 667 F.2d 1030), finding that respondent received "a full and fair hearing of his claims in state court" and that the interpretation given the plea

and I believe counsel has discussed it with [respondent] that it may be necessary in the future to bring [respondent] back after sentencing for further testimony." Respondent's counsel agreed "[t]hat's our understanding" and "[t]hat's correct." Pet. App. A96-A97.

³ As a matter of state law, the Arizona Supreme Court held that the State should not have proceeded with a new information; the court therefore vacated respondent's second degree murder conviction and guilty plea, reinstated the original charge, and dismissed the new information. Adamson I, 125 Ariz. at 583-584, 611 P.2d at 936-937.

agreement by the Arizona Supreme Court and by the district court "is eminently reasonable" (Pet. App. C10). This Court then denied certiorari. 455 U.S. 992 (1982).

4. In October 1980, respondent was convicted of first degree murder and sentenced to death. The Arizona Supreme Court affirmed the conviction and sentence (see *Adamson II*, *supra*), and this Court again denied certiorari. 464 U.S. 865 (1983).

Respondent then filed another petition for habeas corpus, raising a number of issues relating to his trial and sentence. The district court again denied the petition, and a panel of the Ninth Circuit again affirmed. Adamson v. Ricketts, 758 F.2d 441 (1985). At the rehearing en banc stage, however, respondent argued for the first time in this habeas corpus proceeding that his trial on the first degree murder charge violated his double jeopardy rights (see Pet. App. A127 n.1). A majority of the en banc court accepted that argument and granted respondent relief (id. at A1-A36).

The court first held that jeopardy attached to the prosecution for second degree murder when the judgment of conviction was entered and respondent was sentenced on his plea (Pet. App. A14). The court also reasoned that second degree murder is a lesser included offense of first degree murder, so that a conviction on the former charge bars prosecution or conviction on the latter (id. at A15-A17). And the court

found that respondent had not waived his double jeopardy rights by entering into the plea agreement, reasoning that such a waiver can be effective only if it involves "an intentional relinquishment or abandonment of a known right or privilege" (id. at A18 (citation omitted)). "It may well be argued," the court stated, "that the only manner in which [respondent] could have made an intentional relinquishment of a known double jeopardy right would be by waiver 'spread on the record' of the court after an adequate explanation" (id. at A20-A21). Even if respondent could have made an implied waiver of his double jeopardy right, the court continued, "the more reasonable interpretation of the agreement is that double jeopardy was not waived," since "[a]greeing that charges may be [reinstated] under certain circumstances is not equivalent to agreeing that if they are [reinstated] a double jeopardy defense is waived" (id. at A21-A22).

The court went on to hold that, even if the plea agreement could implicitly waive respondent's double jeopardy rights, that waiver would be effective in a given case only if "the defendant's action constituting the breach [of the agreement is] taken with the knowledge that in [committing the breach] he waives his double jeopardy rights" (Pet. App. A24). The court reasoned that a defendant acts with such knowledge only when he intentionally breaches his plea agreement. Here, the court concluded, respondent "reasonably believed that a refusal to testify did not constitute a breach of the agreement." In such circumstances, the court held, "there could be no knowing or intentional waiver until [respondent's] obligation to testify was announced by the court" (id. at A25). The court of appeals accordingly ordered re-

⁴ The court of appeals noted that "[i]n his written refusal to testify and list of demands, [respondent] acknowledged that he ran the risk of reprosecution for first degree murder under the terms of the plea agreement. He cannot now claim immunity in what proved to be a losing gamble." Pet. App. C12.

spondent freed "from the sentence and servitude of his conviction of first degree murder" (id. at A31).

Judge Brunetti, joined by three other judges, dissented (Pet. App. A58-A111). He noted that the court's analysis "render[ed] the plea agreement ineffectual and unenforceable from the inception" (id. at A80). He also criticized the court for basing its holding on the absence of an express waiver of a known right or privilege. In Judge Brunetti's view, a "defendant's role in bringing about * * * successive trials remove[s] any constitutional barrier to the second [trial]" (id. at A82). Here, Judge Brunetti concluded, respondent's refusal to testify was "the triggering event which * * * set into motion the second prosecution, [Respondent] must accept responsibility for the second prosecution; the double jeopardy clause 'does not relieve a defendant from the consequences of his voluntary choice." Id. at A84 (quoting United States v. Scott, 437 U.S. 82, 99 (1978)).5

Judge Brunetti also saw "little doubt" that respondent breached the agreement when he refused to participate in interviews to prepare for the Dunlap and Robison retrials (Pet. App. A86), and he rejected the proposition that respondent "was merely advancing a reasonable interpretation of the plea agreement" (id. at A88). In all, Judge Brunetti found it "clear from the record that [respondent] knew the circumstances confronting him and the consequences of entering into the plea agreement. Accordingly, his acceptance of the agreement constituted a waiver of all conflicting rights existing at that time." Id. at A69.

SUMMARY OF ARGUMENT

1. The court of appeals' holding is premised on the proposition that a defendant's action may trigger a new prosecution only if the defendant intentionally and knowingly relinquished his double jeopardy rights. That premise, however, is flatly inconsistent with this Court's decisions in the double jeopardy area, which repeatedly have held that the Double Jeopardy Clause does not bar successive trials when the defendant himself triggered the need for a second prosecution. Retrial is permissible, for example, when the defendant successfully challenges his conviction on appeal or in collateral proceedings, or when a mis-

budge Kennedy both joined Judge Brunetti's dissent and dissented separately, emphasizing that "[j]eopardy is waived in a number of instances by the defendant's own actions, and no express waiver or admonition is required before the court finds the waiver to have taken place" (Pet. App. A119). He added: "The whole purpose of [plea] agreements, as in this case, is to permit the defendant to plead to lesser charges subject to the risk of facing more serious ones if he does not keep his end of the deal. For the court, deux ex machina, to drop the idea of double jeopardy into the plea bargain context is inconsistent with any reasonable interpretation of the contract made between the defendant and the state. The contract makes no sense if by some legal theory it is contended defendant did not accept it with full knowledge and understanding of its enforcement terms." Id. at A121-A122.

by the court. The majority took the position that its holding left respondent's second degree murder conviction intact; the court of appeals left it to the Arizona Supreme Court to reinstate that conviction (see Pet. App. A31-A32). Judge Brunetti suggested, however, that the court's chosen remedy did not appear to be consistent with the terms of the plea agreement, since the agreement explicitly required the parties to be returned to their pre-plea positions in the event of a breach (id. at A109-A110). See also id. at A125-126 (Kennedy, J., dissenting).

trial is granted on the defendant's motion. Similarly, the Double Jeopardy Clause is not implicated when a defendant elects to have greater and lesser included offenses tried separately, although he normally is entitled to have the two resolved in one proceeding. This principle is fully applicable in the plea bargain context: the courts uniformly have concluded that when a defendant has his guilty plea vacated, a retrial on all the original charges is permissible.

In each of these examples, the crucial factor is that it was the defendant's voluntary action that brought about the second proceeding. In none of them, however, was the defendant's conduct accompanied by a knowing or intentional waiver of double jeopardy rights of the type required by the court of appeals. To the contrary, this Court has "implicitly rejected the contention that the permissibility of a retrial * * * depends on a knowing, voluntary and intelligent waiver of a constitutional right." United States v. Dinitz, 424 U.S. 600, 609-610 n.11 (1976). As the Court has noted, "traditional waiver concepts have little relevance [in this setting]": rather, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." Id. at 609 (footnote omitted). It is enough that the retrial is prompted by the defendant's actions, for "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." United States v. Scott, 437 U.S. 82, 99 (1978).

The court of appeals' holding cannot be reconciled with this principle. Respondent entered the plea agreement voluntarily, with full knowledge and understanding of the proviso that the agreement would "automatically reinstated" if he failed to cooperate as he had agreed. In these circumstances, where it is undisputed that respondent's breach was the triggering event that set the new prosecution in motion, the court of appeals simply—and improperly—used the Double Jeopardy Clause to relieve respondent of the consequences of his voluntary choice. That conclusion would not be affected even if the court of appeals were correct in its highly implausible suggestion that respondent's reading of the plea agreement, although erroneous, was reasonable: respondent voluntarily chose to stand on a questionable reading of the plea agreement, with full knowledge that his interpretation could be rejected by the courts.

2. A review of the purposes of the Double Jeopardy Clause confirms that respondent's rights were not violated by his prosecution for first degree murder. Because respondent's breach of the agreement led the Arizona Supreme Court to vacate his conviction and sentence, he did not face the risk of multiple punishment for the same offense. Conversely, the State was not attempting to revive an unsuccessful prosecution: respondent had never faced trial or been exposed to conviction on the first degree murder charge. Once respondent's breach returned the parties to their original positions, the State simply sought to exercise "its right to one full and fair opportunity to convict [an individual] who ha[s] violated its laws." Ohio v. Johnson, 467 U.S. 493, 502 (1984).

The court of appeals' analysis is also contrary to the principle that a court must look to the implications "for the sound administration of justice" of applying a double jeopardy bar in a given context.

United States v. Tateo, 377 U.S. 463, 466 (1964). Far from taking those implications into account, the court of appeals' holding would render plea agreements almost entirely unenforceable by the government, at least to the extent that they imposed future obligations on the defendant. That holding would allow defendants to disregard the terms of their plea agreements at will, secure in the knowledge that their refusal to comply could not be reciprocated by the government. Such a result does nothing to safeguard the legitimate interests of defendants. To the contrary, far from furthering the purposes of the Double Jeopardy Clause, the decision below would permit defendants "to use the Double Jeopardy Clause as a sword" to prevent the State from securing compliance with the terms of its plea agreements. Johnson, 467 U.S. at 502.

ARGUMENT

PROSECUTION OF A DEFENDANT WHO BREACHES A PLEA AGREEMENT IS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE

The court of appeals offered three alternative rationales for its refusal to enforce the terms of respondent's plea bargain. First, it held that a defendant cannot relinquish his double jeopardy rights (and thus permit a new trial after jeopardy has once attached) unless he expressly waives those rights on the record (Pet. App. A18-A21). Second, it held that, even if an implied waiver of double jeopardy rights may be made, the plea agreement here effected no such waiver (id. at A22-A23). Third, it held that, even if the agreement did implicitly waive respondent's double jeopardy protections against a new prosecution, such a waiver would be effective only if respondent intentionally breached the plea agreement with the knowledge that in doing so he waived his

double jeopardy rights (id. at A23-A24). While these are alternative holdings, all are based on one common premise: that a defendant's action may trigger a new prosecution only if that action amounted to an "intentional relinquishment or abandonment of a known [double jeopardy] right," as that standard was described in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See Pet. App. A18-A19.

The court of appeals' premise is flatly inconsistent with this Court's decisions in the double jeopardy area, which repeatedly have held that the Double Jeopardy Clause does not protect a defendant from the consequences of his voluntary actions. At the same time, the court of appeals disregarded this Court's more general admonition that double jeopardy principles must be applied with an eye towards "the implications of [those] principle[s] for the sound administration of justice." United States v. Tateo, 377 U.S. 463, 466 (1964). And the court of appeals failed to take into account either the nature of the plea bargaining process or the plain meaning of respondent's bargain. When these considerations are weighed, it becomes clear that the court of appeals' holding is fatally flawed.

A. The Double Jeopardy Clause Does Not Relieve A Defendant Of the Consequences Of His Voluntary Actions

1. This Court has consistently held that the Double Jeopardy Clause does not bar successive trials when it is the defendant's action that triggers the need for a new prosecution—when, in other words, the defendant acts in a way that returns him to the situation that prevailed prior to the point at which jeopardy first attached. For example, it has long been the law that a defendant whose conviction is set aside

on appeal "may be tried anew upon the same indictment, or upon another indictment, for the same offence [sic] of which he had been convicted." United States v. Ball, 163 U.S. 662, 671-672 (1896). A retrial also is permissible when the defendant has successfully sought collateral relief, see Tateo, 377 U.S. at 465, or when he has prevailed at trial on a motion to dismiss. See Lee v. United States, 432 U.S. 23, 33 (1977). And when the defendant "successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution"-even where the mistrial motion is prompted by prosecutorial or judicial error. United States v. Scott, 437 U.S. 82, 93 (1978). See United States v. Dinitz, 424 U.S. 600, 608 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion); see generally Sanabria v. United States, 437 U.S. 54, 63 n.15 (1978).

In other, related contexts, the Court similarly has held that multiple prosecutions growing out of the same offense may be permissible when the second proceeding was prompted or made necessary by the defendant's voluntary actions. Thus, "although a defendant is normally entitled to have charges on a greater and lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." Jeffers v. United States, 432 U.S. 137, 152 (1977) (plurality opinion). And the Court has held that a defendant's guilty plea to a lesser included offense does not bar trial on the greater offense charged along with it, if it was the defendant's effort

that led to "separate disposition of counts in the same indictment." Ohio v. Johnson, 467 U.S. 493, 502 (1984).

Not surprisingly, the courts of appeals have found this principle fully applicable in the context of plea bargains. Plea agreements commonly provide that a defendant will plead guilty to one or more counts of an indictment in exchange for the prosecution's agreement to dismiss the remaining counts. In that setting, if the defendant successfully moves to have his guilty plea vacated, the courts have uniformly held that he can properly be tried on all the original charges. Such a trial on all the charges is permissible because it was the defendant's "own decision to plead guilty and to have that plea set aside." United States v. Barker, 681 F.2d 589, 591 (9th Cir. 1982). See Klobuchir v. Pennsylvania, 639 F.2d 966, 969-970 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); Hawk. v. Berkemer, 610 F.2d 445, 447-448 (6th Cir. 1979); United States v. Johnson, 537 F.2d 1170, 1174 (4th Cir. 1976); United States v. Anderson, 514 F.2d 583, 586-587 (7th Cir. 1975); United States v. Jerry, 487 F.2d 600, 606 (3d Cir. 1973); Ward v. Page, 424 F.2d 491, 493 (10th Cir), cert. denied, 400 U.S. 917 (1970); United States v. Myles, 430 F. Supp. 98, 101-102 (D.D.C. 1977), aff'd, 569 F.2d 161 (D.C. Cir. 1978). Cf. United States v. Whitley, 759 F.2d 327, 332 (4th Cir.) (en banc), cert. denied, No. 84-6980 (Oct. 7, 1985); Lowery v. Estelle, 696 F.2d 323, 340-342 (5th Cir. 1983); United States ex rel. Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971).

2. In each of those settings, the crucial factor was the defendant's voluntary action that brought about the second proceeding. In none of them, however, was that action accompanied by a knowing, intelligent, or

⁷ This rule does not apply, of course, when the conviction is set aside for insufficiency of the evidence. See *Burks* v. *United States*, 437 U.S. 1 (1978).

intentional waiver of double jeopardy rights of the type required by the court of appeals here. The defendants who requested a mistrial or pursued an appeal, for example, were not warned by the court that in doing so they risked a retrial; at the same time, of course, the defendants did not explicitly relinquish (or, indeed, advert in any way to) their double jeopardy rights.

As this Court has stated, the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal thus does not depend on the defendant's making a "knowing, voluntary and intelligent waiver of a constitutional right." Dinitz, 424 U.S. at 609-610 n.11. To the contrary, the Court has explained, "traditional waiver concepts have little relevance" in this setting; [t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." Id. at 609 (footnote omitted). See Scott, 437 U.S. at 93-94; Lee, 432 U.S. at 32-33; Jorn. 400 U.S. at 484-485 n.11 (plurality opinion).

It is enough that the retrial is prompted "by the actions of the defendant himself" (Garrett v. United States, No. 83-1842 (June 3, 1985), slip op. 3 (O'Connor, J., concurring)), for "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." Scott, 437 U.S. at 99.

The permissibility of retrial therefore does not turn on the existence of a conventional "waiver" of double jeopardy rights. As long as it is the defendant's voluntary action that aborts his trial or obviates his conviction, the principles underlying the Double Jeopardy Clause are satisfied: in that setting, requiring the defendant to stand trial again "is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." Scott, 437 U.S. at 91. See Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 308 (1984); Tibbs v. Florida, 457 U.S. 31, 40 (1982). This principle thus involves not so much a relinquishment of

defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." *Id.* at 191-192; see *id.* at 193-194.

In Green v. United States, 355 U.S. 184, 189 (1957), the Court discussed the "waiver" of double jeopardy protections in terms of the voluntary relinquishment of a known right. The Court actually held, however, that the defendant's action did not amount to a "waiver" because it was not voluntary. The defendant in Green was tried on charges of first and second degree murder; the jury found him guilty only of second degree murder. When the verdict was set aside on the defendant's appeal, the government attempted to retry him for first degree murder as well. The Court held that the defendant's appeal did not constitute a "waiver" of his double jeopardy protections against such a reprosecution, reasoning that "[w]hen a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional

Similarly, in Menna v. New York, 423 U.S. 61 (1975) (per curiam), the Court held that a defendant who had pleaded guilty after unsuccessfully seeking dismissal of his indictment on double jeopardy grounds did not "waive" his double jeopardy claim by the entry of his plea. See id. at 62-63 & n.2. The ruling in that case has no bearing here, since the defendant in Menna took no action to return himself to the position that he occupied prior to the attachment of jeopardy. In any event, the Court did not suggest that conduct having the effect of waiving a double jeopardy claim must satisfy the requirements of Johnson v. Zerbst, supra, in order to be valid.

constitutional prerogatives as a determination that the Clause simply does not apply when retrials are

triggered by the defendants' actions.

3. The court of appeals' holding in this case cannot be reconciled with these principles of double jeopardy law. It is conceded that respondent entered the plea agreement voluntarily, with full knowledge of its provisions-including the proviso that the agreement would be rendered "null and void" and the original charge "automatically reinstated" if he failed to cooperate as agreed (Pet. App. A39-A40). And respondent plainly understood the consequences of a breach; indeed, in the letter announcing his refusal to cooperate, he declared his awareness that the State might seek to nullify the plea agreement and, if successful, might prosecute him for first degree murder (id. at A49-A50). Given the plain terms of the plea agreement, it would have been wholly incredible for him to have suggested otherwise.9 Cf. Taylor v. United States, 414 U.S. 17, 19-20 (1973). In these circumstances, where it is undisputed that respondent's breach was "the triggering event * * * which set in motion the new prosecution" (Pet. App. A84 (Brunetti, J., dissenting)), the court of appeals simply—and improperly—used the Double Jeopardy

Clause to rescue respondent "from the consequences of his voluntary choice." Scott, 437 U.S. at 99.

As long as respondent knew he would be subject to reprosecution if he violated the plea agreement, it was of no consequence whether he knew that the legal significance of what he was doing was to waive his double jeopardy rights. The information on the face of the agreement—which clearly advised respondent that he would be subject to prosecution under the original charge if he failed to comply with his obligation of cooperation-was all the information he needed to make his choice. By consciously running the risk that he would have to face prosecution on the original charge, respondent knowingly abandoned the protection that the plea agreement afforded him. An awareness of the legal description of that protection would not have altered in any way the nature of the choice he faced.

That the reprosecution ultimately is attributable to respondent also comes clear from the nature of the plea bargaining process itself. Plea bargains are essentially contractual undertakings that are rendered unenforceable when either side commits a breach. See generally Mabry v. Johnson, 467 U.S. 504, 509-510 (1984); United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985); United States v. Carrillo, 709 F.2d 35, 36-37 (9th Cir. 1983); United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979); United States v. Gogarty, 533 F.2d 93, 95 (2d Cir. 1976). Here, the State agreed to forgo a first degree murder prosecution on the express condition that respondent fulfill the terms of the agreement. When respondent refused to comply, his position did not differ in any essential way from that of a defendant who seeks to withdraw a guilty plea: in

^{*}Indeed, as Judge Kennedy noted in dissent (Pet. App. A121-A122), the essential purpose of any plea agreement is to permit the defendant to avoid prosecution on a greater charge, subject to the threat of prosecution on that charge if he fails to comply with the agreement's terms. That threat is the essential enforcement mechanism of all plea agreements. It belies belief that either the State or the defendant would enter into a plea agreement without appreciating this—or that, as the court of appeals held to be the case here (id. at A21-A22), either side would believe that the defendant could assert double jeopardy as a defense to such a prosecution.

essence, respondent simply wanted to get out of his bargain. In doing so, he returned the parties to the positions that they occupied before jeopardy attached. The Double Jeopardy Clause, after all, "represents a constitutional policy of finality for the defendant's benefit" (Jorn, 400 U.S. at 479 (plurality opinion)); a defendant who pretermits prosecution by entering into an executory agreement and then refuses to comply should not benefit from that policy.

This conclusion would not be affected even if the court of appeals were correct in its implausible suggestion that respondent's reading of the plea agreement, although erroneous, was reasonable. 10 Respondent was entitled to a judicial determination as to

whether he had breached the agreement. See United States v. Verusio, No. 85-1690 (7th Cir. Oct. 9, 1986): United States v. Calabrese, 645 F.2d 1379, 1389-1390 (10th Cir.), cert. denied, 451 U.S. 1018 (1981); United States v. Simmons, 537 F.2d 1260, 1261-1262 (4th Cir. 1976). He received that determination from the Arizona Supreme Court before the prosecution was begun on the original charges. To be sure, that determination came after the prosecutors had already concluded that respondent was in breach of the agreement and had decided to reinstate the original charges against him as a result. But the Double Jeopardy Clause does not relieve defendants of the burden of making difficult decisions; a defendant who must decide whether to seek a mistrial, for example, often "face[s] a 'Hobson's choice'" (Dinitz, 424 U.S. at 609) between surrendering the right to have his case decided in one proceeding and allowing a trial tainted by error to continue. Similarly, a defendant who asserts (as respondent did) a reading of his plea agreement that is no better than arguable "takes the risk" that a court will find his interpretation incorrect. Scott, 437 U.S. at 100 n.13.11 That this procedure puts the defendant to a difficult

¹⁰ In finding respondent's position reasonable, the court of appeals pointed to a provision of the plea agreement stating that respondent would be sentenced "'at the conclusion of his testimony"; the cour of appeals concluded that this provision might be read to terminate respondent's obligations to testify at the time that he was sentenced. Pet. App. A25-A26. The Arizona Supreme Court, however, found it plain from the terms of the agreement that respondent was obligated to testify "at trial or retrial after reversal," and explained that at the sentencing hearing itself respondent evidenced "a clear understanding that [he] would testify after [his] sentencing." Adamson I, 125 Ariz. at 583, 611 P.2d at 936. Given this definitive factual finding that respondent "clearly underst[ood]" his obligations, it is difficult to see how his refusal to cooperate could have been made in good faith, no matter how ambiguous the terms of the plea agreement. In any event, on respondent's first petition for habeas corpus, a panel of the Ninth Circuit found the Arizona Supreme Court's interpretation of the agreement "eminently reasonable" (Pet. App. C10). And Judge Brunetti's careful analysis of the record makes it clear that respondent's refusal to testify was entirely unjustified.

¹¹ It may be added that, as a practical matter, a defendant who advances a good faith interpretation of his plea agreement is unlikely to suffer even if that interpretation ultimately is rejected by a court. Once the defendant's obligations are settled, the prosecution is likely to be satisfied if the defendant is willing to comply with the terms of the agreement (as long as the value of the defendant's cooperation has not diminished during the period of his recalcitrance); after all, the government's need for the defendant's cooperation—which induced it to enter into the agreement as an initial matter—is likely to lead it to the same conclusion the second time around.

choice between acquiescing in the government's request and asserting a debatable interpretation of the plea agreement does not implicate the Double Jeopardy Clause, as long as the choice remains the defendant's to make. See *Dinitz*, 424 U.S. at 609.

B. The Court Of Appeals' Holding Is Inconsistent With The Policies Of The Double Jeopardy Clause

1. As the discussion above suggests, the purposes of the Double Jeopardy Clause—forestalling a certain sort of "governmental oppression" (Scott, 437 U.S. at 91)—are not implicated when the defendant's voluntary action invites the reprosecution. A more detailed look at those purposes confirms that "[n]o interest of respondent protected by the Double Jeopardy Clause" (Johnson, 467 U.S. at 501) is affected by his prosecution on a first degree murder charge.

"The primary purpose of foreclosing a second prosecution after conviction * * * is to prevent a defendant from being subjected to multiple punishment for the same offense." Lydon, 466 U.S. at 307. See Brown v. Ohio, 432 U.S. 161, 166 (1977). That concern has no bearing in this case, where respondent's breach of the plea agreement led the Arizona Supreme Court to vacate his conviction and sentence. Conversely, the State is not attempting to revive an unsuccessful prosecution: respondent has never been exposed to conviction on the first degree murder charge, "nor has the State had an opportunity to marshal its evidence and resources more than once or to have the presentation of its case through a trial." Johnson, 467 U.S. at 501. See Tibbs, 457 U.S. at 41-42.12 And a case in which the defendant pleaded guilty prior to jury selection plainly does not involve "the defendant's 'valued right to have his trial completed by a particular tribunal." Dinitz, 424 U.S. at 606 (citation omitted).

Equally as important, the imposition of a double jeopardy bar is not necessary to serve what the Court has often stated as the broad purpose of the Clause: "ensur[ing] that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction." Johnson, 467 U.S. at 498-499. See Scott, 437 U.S. at 87; Green v. United States, 355 U.S. 184, 187-188 (1957). At the time the State initially was prepared to go to trial in this case, respondent induced it to terminate the prosecution on the conditions set out in the plea agreement. Now that respondent's breach of the agreement has returned the parties to their original positions, the State is simply seeking to exercise "its right to one full and fair opportunity to convict [an individual] who ha[s] violated its laws." Johnson, 467 U.S. at 502. See Arizona v. Washington, 434 U.S. 497, 509 (1978).

2. The flaw in respondent's position also is suggested by the other prong in this Court's double jeopardy analysis, which has looked to the implications "for the sound administration of justice" of applying a double jeopardy bar in a given context. Tateo, 377 U.S. at 466. See Lydon, 466 U.S. at 308. Far from taking such considerations into account, the court of appeals' holding renders plea agreements—which are, of course, an "important component of this country's criminal justice system" (Blackledge v. Allison, 431 U.S. 63, 71 (1977))—almost entirely unenforceable by the government, at least to the ex-

¹² Similarly, there has been no implied acquittal of respondent for first degree murder. See *Johnson*, 467 U.S. at 501. Compare *Green* v. *United States*, 355 U.S. 184, 191 (1957).

tent that they impose future obligations on the defendant.

Predictability and reliance are "the foundation of plea bargaining." United States v. McIntosh, 612 F.2d 835, 837 (4th Cir. 1979). The approach taken by the court of appeals, however, would make reliance on the defendant's undertakings impossible by "giv[ing] the defendant more than the benefit of his bargain." United States v. Anderson, 514 F.2d 583, 587 (7th Cir. 1975). Indeed, unless the plea agreement is drafted with extraordinary precisiona precision that, if the scrutiny given the agreement here by the court of appeals is any indication, is beyond the capability of most attorneys (see Pet. App. A20-A22, A25-A26)—the court of appeals' holding would allow defendants to disregard the terms of their plea agreements at will, secure in the knowledge that their refusal to comply could not be reciprocated by the government. The result inevitably would be to discourage the use of plea agreements, a development that would benefit neither society nor criminal defendants. See generally McMann, 436 F.2d at 107.

This would be "a high price indeed for society to pay" (Tateo, 377 U.S. at 466) even if the court of appeals' approach otherwise had beneficial effects. The court's holding, however, does nothing to safeguard the legitimate interests of defendants. Their expectations are protected by the plea agreement itself—whose terms are enforceable as a matter of due process (see generally Mabry, 467 U.S. at 509; Santobello v. New York, 404 U.S. 257, 262-263 (1971))—and by the Double Jeopardy Clause, which stands as an independent bar to renewed prosecution on a greater offense when the defendant has pleaded guilty to a lesser included offense. See Brown v.

Ohio, supra. The court of appeals' decision in this case thus gives defendants no added protection against government overreaching. Instead, the decision simply permitted respondent "to use the Double Jeopardy Clause as a sword" to prevent the State from securing compliance with its plea agreement. Johnson, 467 U.S. at 502. Giving such a benefit to a defendant who breaches his plea agreement would be perverse. Respondent's maneuvers should not be rewarded under the mantle of protecting his right to be free from double jeopardy; to the contrary, those maneuvers "should result in a surrender" of his claim to the protection of the Double Jeopardy Clause. Sanabria, 437 U.S. at 80-81 (Blackmun, J., dissenting) (emphasis added).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court, U.S.
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GOSEPH F. SPANIOL JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES G. RICKETTS, Director, Arizona Department of Corrections, et al.,

Petitioners.

V

JOHN HARVEY ADAMSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

- 1. Does 28 U.S.C. § 2254(d) require a federal court, reviewing a habeas corpus petition, to defer to a state court determination that a defendant has waived his federal constitutional rights?
- 2. Did the Court of Appeals err in finding that, on the facts of this particular case, and under the appropriate federal standard, John Adamson did nothing which forfeited the protection of the Double Jeopardy Clause of the fifth amendment?

TABLE OF CONTENTS	
P	age
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
1. The Crime	1
2. The Agreement	2
3. Mr. Adamson's Performance Under The Agree-	
ment	4
4. The Imposition Of Sentence	5
5. Mr. Adamson's Alleged Violation Of The Agree-	
ment	6
 The Reinstitution Of Capital Murder Charges, And The Proceedings In The Arizona Supreme 	
Court	10
7. Mr. Adamson's Offer To Comply With The	19
Agreement	13 14
8. Mr. Adamson's Trial And Death Sentence	
9. The Habeas Corpus Proceedings Below	16
SUMMARY OF ARGUMENT	16
ARGUMENT	19
I. THE PROTECTIONS AFFORDED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT	
CAN BE FORFEITED ONLY BY A CRIMINAL	
DEFENDANT'S KNOWING AND VOLUNTARY	
ACTION.	19
II. THE COURT OF APPEALS' DECISION DID NOT CON-	
TRAVENE ANY FACTUAL DETERMINATION MADE	
BY THE SUPREME COURT OF ARIZONA WHICH WAS	
ENTITLED TO DEFERENCE UNDER 28 U.S.C.	95
§ 2254(d).	25
A. The Court Of Appeals Properly Recognized That There Is A Difference Between The	
Breach Of A State Contract And The Waiver Of	
A Federal Constitutional Right	27
B. The Arizona Supreme Court Did Not Find,	
And Could Not Properly Have Found, That Mr. Adamson Understood He Was Waiving His	
Double Jeopardy Rights	31

	Table of Contents Continued	
		Page
III.	THE COURT OF APPEALS CORRECTLY FOUND THAT	
	JOHN ADAMSON DID NOTHING WHICH WAR-	
	RANTED FORFEITURE OF THE PROTECTIONS OF	
	THE DOUBLE JEOPARDY CLAUSE	36
	A. The Court Of Appeals' Analysis	37
	B. The "Policies" Of The Double Jeopardy Clause	43
Con	CLUSION	50

TABLE OF AUTHORITIES		
Pa	ge	
Adamson v. Hill, U.S. D.C. Ariz. No. 80-502 PHX CAM 6,	24	
Adamson v. Hill, 667 F.2d 1030 (9th Cir. 1981) cert. denied, 455 U.S. 992 (1982)	14	
Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986) passi	im	
Adamson v. Superior Court, 611 P.2d 932 (Ariz. 1980)		
Arizona v. Rumsey, 467 U.S. 203 (1984) 19, 24,		
	44	
	28	
24	25	
Detition in the district of the contract of th	48	
Blanton v. Blackburn, 494 F.Supp. 895 (M.D. Ala. 1980),		
	48	
Boykin v. Alabama, 395 U.S. 238 (1969) 28,	49	
	29	
Brown v. Ohio, 432 U.S. 161 (1977) 19, 29,	44	
	48	
	24	
Burger King Corp. v. Family Dining Inc., 426 F.Supp. 485 (E.D. Penn. 1977), aff d 566 F.2d 1168 (3rd Cir.		
1978)	43	
	34	
	21	
	44	
	29	
	49	
	28	
Downum v. United States, 372 U.S. 734 (1963)	45	
Dunlap v. Corbin, 9th Cir. No. 81-5054 (1982)	13	
Fay v. Noia, 372 U.S. 391 (1963)	28	
Ford v. Wainwright, 106 S.Ct. 2595 (1986) 29,	34	
Franklin Life Insurance Co. v. Mast, 435 F.2d 1038 (9th Cir. 1970)	32	
	21	
	42	
	28	
Great Northern Railway Company v. Washington, 300		
U.S. 154 (1937)	30	
Green v. United States, 355 U.S. 184		
(1957)	46	

Table of Authorities Continued	
	Page
Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979)	23
Helena Chemical Co. v. Coury Bros. Ranches, Inc., 616 P.2d 908 (Ariz. App. 1980)	33
Hoffer v. Morrow, 797 F.2d 348 (7th Cir. 1986)	21
James v. Kentucky, 466 U.S. 341 (1984)	30
Jeffers v. United States, 432 U.S. 137 (1977)	25
Johnson v. Zerbst, 304 U.S. 458 (1938) 20, 21, 22	
Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984).	23
Kepner v. United States, 195 U.S. 100 (1904)	23
Kimel v. Missouri State Life Ins. Co., 71 F.2d 921 (10th Cir. 1934)	39
Kimmelman v. Morrison, 106 S.Ct. 2574 (1986)	32
Kirchellis v. Long, 425 F.Supp. 505 (S.D.Ala. 1976)	48
Klobuchir v. Pennsylvania, 639 F.2d 966 (3d Cir. 1981).	23
Launius v. United States, 575 F.2d 770 (9th Cir. 1978)	21
Lee v. Illinois, 106 S.Ct. 2056 (1986)	29
Lefkowitz v. Newsome, 420 U.S. 283 (1975) 28	
Lefkowitz v. Turley, 414 U.S. 70 (1973)	28
Liner v. Jafco, Inc., 375 U.S. 301 (1965)	30
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	30
Lombrano v. Superior Court, 606 P.2d 15 (Ariz. 1981)	38
Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983)	23
Menna v. New York, 423 U.S. 61 (1975) 20, 21	, 37
Miller v. Fenton, 106 S.Ct. 445 (1985)	29
Mobley v. New York Life Insurance Co., 295 U.S. 632	
(1935)	39
Murray v. Carrier, 106 S.Ct. 2639 (1986)	28
North Carolina v. Alford, 400 U.S. 25 (1970)	28
North Carolina v. Pearce, 395 U.S. 711 (1969)	24
New York Life Insurance Co. v. Viglas, 297 U.S. 672 (1936)	39
Ohio v. Johnson, 467 U.S. 493 (1984)	47
Oksanen v. United States, 362 F.2d 74 (8th Cir. 1966)	21
Oregon v. Kennedy, 456 U.S. 667 (1982).: 24	, 25
Parker v. Illinois, 333 U.S. 571 (1948)	28
Price v. Georgia, 398 U.S. 323 (1970)	, 24
Raley v. Ohio, 360 U.S. 423 (1959)	41

Table of Authorities Continued	
	ge
Richardson v. United States, 468 U.S. 317 (1984)	23
Rogers v. Richmond, 365 U.S. 534 (1961) 29,	30
Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983)	48
Santobello v. New York, 404 U.S. 257 (1971) 29,	50
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	21
Sahadi v. Continental Illinois National Bank, 706 F.2d 193 (7th Cir. 1983)	43
Smalis v. Pennsylvania, 106 S.Ct. 1745 (1986)	30
Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983)	48
State v. Adamson, 665 P.2d 972 (Ariz. 1983)	14
State v. Barnes, 414 P.2d 149 (Ariz. 1966)	36
State v. Cain, 324 So.2d 830 (La. 1975)	21
State v. Dunlap, 608 P.2d 41 (Ariz. 1980)	, 6
State v. Rivest, 316 N.W.2d 395 (Wisc. 1982)	42
State v. Robison, 608 P.2d 44 (Ariz. 1980)	6
State v. Telavera, 261 P.2d 997 (Ariz. 1953)	36
Townsend v. Sain, 372 U.S. 293 (1963) 26,	28
Turner v. United States, 459 A.2d 1054 (D.C. App. 1983)	21
United States Ex Rel. Williams v. McMahon, 436 F.2d 103 (2d Cir. 1970) cert. denied 402 U.S. 914 (1971).	24
United States v. Acosta, 526 F.2d 670 (5th Cir. 1976)	48
United States v. Anderson, 514 F.2d 583 (7th Cir. 1975) 20,	21
United States v. Barnham, 595 F.2d 231 (5th Cir. 1979).	48
United States v. Broce, 781 F.2d 792 (10th Cir. 1986)	21
United States v. Davis, 582 F.2d 947 (5th Cir. 1979)	48
United States v. Dinitz, 424 U.S. 600 (1976) 22, 25,	44
United States v. Figurski, 545 F.2d 389 (4th Cir. 1976).	48
United States v. Fontenot, 483 F.2d 315 (5th Cir. 1973).	48
United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976)	48
United States v. Jerry, 487 F.2d 600 (3d Cir. 1973)	23
United States v. Johnson, 537 F.2d 1170 (4th Cir. 1976).	23
United States v. Jorn, 400 U.S. 470 (1971)	44
United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973)	48
United States v. Madonna, 556 F.Supp. 260 (S.D.N.Y.	
1982)	48
(1977)	24
United States v. Mules, 430 F. Sunn, 98 (D.D.C. 1977)	23

lable of Authorities Continued	
	age
United States v. Rich, 589 F.2d 1025 (10th Cir. 1978)	21
United States v. Scott, 437 U.S. 82 (1977) 25	, 45
United States v. Simmons, 537 F.2d 1260 (4th Cir.	
1976)	, 48
United States v. Solimine, 536 F.2d 703 (6th Cir. 1976).	48
United States v. Tashman, 478 F.2d 129 (5th Cir. 1973).	48
United States v. Verrusio, 803 F.2d 885 (7th Cir. 1986).	48
United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984)	48
United States v. Whitley, 759 F.2d 327 (4th Cir. 1985)	24
United States v. Young, 503 F.2d 1072 (3rd Cir. 1974)	21
Wainwright v. Sykes, 433 U.S. 72 (1977)	28
Walker v. Shasta Minerals and Chemical Co., 352 F.2d	
634 (10th Cir. 1965)	39
Ward v. Page, 424 F.2d 491 (10th Cir. 1970)	23
Williams v. Brown, 609 F.2d 216 (5th Cir. 1980)	48
Statutes	
Ariz. Rev. Stat. § 13-703	14
Ariz. Rev. Stat. § 13-703 (F)	15
Ariz. Rule of Crim. Pro. 17.4	3
28 U.S.C. § 2254(d) pas	
28 U.S.C. § 2254(d)(3)	34
28 U.S.C. § 2254(d)(6)	33
28 U.S.C. § 2254(d)(8)	35
OTHER AUTHORITIES	
Restatement (Second) of Contracts, § 229	49
Restatement (Second) of Contracts, § 236	43
Postatement (Second) of Contracts, § 230	43
Restatement (Second) of Contracts, § 237	43
Black's Law Dictionary (5th Ed. 1979)	33
Calamari & Perillo, The Law of Contracts (2nd Ed. 1977)	43
Fried, Contract as Promise (1981)	43

STATEMENT OF THE CASE

This case comes to this Court for review of the Court of Appeals' reversal of a District Court's summary dismissal of John Harvey Adamson's Petition for a Writ of Habeas Corpus.

At no time, either in the District Court or in the state courts, has there been an evidentiary hearing regarding the facts and circumstances surrounding the central matter at issue here: the plea agreement between John Harvey Adamson and the State of Arizona, and Mr. Adamson's supposed violation of that agreement. However, the pleadings, arguments, and representations made by Mr. Adamson and his counsel throughout the course of the state and federal proceedings have outlined what occurred; and their contentions never have been seriously disputed by the State of Arizona.

Because the Court of Appeals' disposition of the issue here turned on a careful examination of these facts, and because the Petitioner's Brief glosses over them, we are constrained to set them out here again.

1. The Crime.

On June 2, 1976, Arizona Republic newspaper reporter Don Bolles was fatally injured by the explosion of a bomb attached to his automobile in a parking lot in Phoenix, Arizona. The bomb was attached to Mr. Bolles' car by John Harvey Adamson. It was detonated by a cohort of Mr. Adamson's, James Robison. See State v. Dunlap, 608 P.2d 41, 42 (Ariz. 1980). Mr. Adamson was hired to kill Mr. Bolles by a man named Max Dunlap, because Mr. Bolles had been "troublesome to Dunlap's friend and mentor, Kemper Marley." Ibid.

After he sustained his injuries, Mr. Bolles made statements indicating that he believed that Mr. Adamson was responsible for the bombing. State v. Adamson, 665 P.2d

972, 977 (Ariz. 1983). Based on those statements, and other evidence, Mr. Adamson was arrested and charged with Mr. Bolles' murder on June 13, 1976, the same day Mr. Bolles died. JA 164, 195. No other suspects were charged until January, 1977, when Mr. Adamson agreed to cooperate with the authorities in solving this, and three other crimes.

2. The Agreement.

The agreement between Mr. Adamson and the Arizona authorities was reached on January 15, 1977, as the jury was being impaneled for Mr. Adamson's trial. JA 1, 14. It was recorded in a document signed by Mr. Adamson, his attorneys, and representatives of the State. 1 The agreement provided that Mr. Adamson would plead guilty to the crime of second degree murder, and would receive a sentence of 48 to 49 years (with 20 years actual imprisonment), for the Bolles murder. JA 195. The State agreed not to prosecute Mr. Adamson for the crimes about which he would testify, and had given transcribed statements. JA 195, 197. Mr. Adamson agreed (1) to plead guilty to the charge of second degree murder, (2) to refrain from applying for parole for a period of 20 years and two months, (3) to testify truthfully against any and all parties involved in the murder of Don Bolles, the beating of a man named Leslie Boros, and two other crimes;2 (4) to waive the time

for sentencing until "the conclusion of his testimony in all the cases referred to in this agreement," (5) to refrain from appealing from the judgment and sentence; and (6) to abandon "any and all motions, defenses, objections, or requests that he has made or raised, or could assert hereafter, against the court's entry of judgment and imposition of sentence upon him consistent with this agreement." JA 195-199.

Pursuant to Arizona Rule of Criminal Procedure 17.4. the plea agreement was submitted to the judge then presiding over Mr. Adamson's prosecution, the Hon. Ben C. Birdsall. Judge Birdsall first reviewed the agreement with Mr. Adamson in open court, asking him if he understood each paragraph of the written document. JA 16-31. During this review of the plea agreement, Judge Birdsall advised Mr. Adamson, among other things, that sentencing "may occur at some date in the future when all your testimony in the various cases has been accomplished." JA 24. He also inquired in detail about each of the constitutional rights Mr. Adamson was giving up, by his guilty plea; Mr. Adamson said he understood these rights. JA 30-31.3 Finally, Judge Birdsall asked Mr. Adamson what he had done in connection with the Bolles murder, to establish the factual basis for the plea; Mr. Adamson responded, admitting his participation in the crime. JA 33-35. Judge Birdsall then took the matter under advisement, in order to make a determination as to whether the plea agreement and sentencing provisions were appropriate. JA 37-39.

¹ An abbreviated form of the agreement—lacking the caption, introductory paragraph, and signature lines—is set out as an appendix to the Court of Appeals' en banc opinion in this case. JA 195-199. Two exhibits incorporated into the agreement, which set out the specific cases in which Mr. Adamson had agreed to testify, were filed under seal along with the agreement itself. JA 196. They are not part of the present record.

² The two other crimes were specified in the exhibits filed with the agreement. They were the attempted bombing of the Bureau of Indian Affairs and the attempted arson of Ashford Plumbing Company, both of which occurred in Phoenix, Arizona. See JA 93, 118.

³ Judge Birdsall advised Mr. Adamson that his guilty plea under the agreement resulted in waiver of the following constitutional rights: (1) speedy public trial, (2) confrontation and cross-examination, (3) presentation of evidence and witnesses, (4) representation and appointment of counsel, (5) freedom from self-incrimination, and (6) presumption of innocence. JA 30-31, 199. Double jeopardy was not included.

5

Four days later, court reconvened. Judge Birdsall indicated that he had reviewed the presentence report and "the plea agreement and all other matters which have been before this Court, and the matters contained in the file in this case . . . the transcript of the preliminary hearing," and made this finding:

[T]he Court finds that the provisions contained in the plea agreement regarding the sentence to be imposed upon the defendant are appropriate and the Court is not going to reject those provisions.

JA 43. Judge Birdsall then continued the sentencing date "subject to call." JA 43.

3. Mr. Adamson's Performance Under the Agreement.

Pursuant to the agreement, over the following two years, Mr. Adamson testified in a series of prosecutions.

During the period of time from January 19, 1977 to December 7, 1978, pursuant to the plea agreement, Petitioner testified a[t] trial in State of Arizona v. Stan Tanner and James Robison regarding the alleged beating of talent agent, Les Boros. During this period of time, Petitioner testified at the preliminary hearing and at trial in State of Arizona v. Max Dunlap and James Robison in connection with the alleged murder of Don Bolles. Further, during this same period of time, Petitioner testified at trial in United States of America v. James Robison and Neil Roberts in connection with the alleged attempted bombing of the Bureau of Indian Affairs Building in Phoenix. All of the defendants were convicted of the criminal offenses with which they were charged.

JA 118. There has never been a claim by the State of Arizona that Mr. Adamson's testimony was less than complete and truthful in any of these cases. In only one case covered by the plea agreement—the case involving the attempted arson of the Ashford Plumbing Company in

Phoenix—did Mr. Adamson not testify, because the case was never filed. Mr. Adamson cooperated fully in each case, and complied in every other respect with the terms of his plea agreement.⁴

4. The Imposition of Sentence.

William Schafer III contacted Mr. Adamson's counsel and Judge Birdsall's court, and asked that Mr. Adamson be sentenced under the plea agreement. JA 91, 142. Mr. Schafer later explained that the request was made because Mr. Adamson's testimony had placed him in danger from the others he had implicated, so the sentencing was "for Mr. Adamson's safety—to get Mr. Adamson into a form of confinement and custody that was better than the one he was currently in." JA 102. Mr. Adamson's attorneys were surprised by Mr. Schafer's request (JA 91), and questioned Mr. Schafer about the wisdom of imposing the sentence prior to the conclusion of the Dunlap and Robison appeals (JA 142), but did not object to having Mr. Adamson sentenced. JA 92.

On December 7, 1978, proceedings were reconvened in Judge Birdsall's court for the imposition of sentence. JA 46. Just before they went to court, Mr. Schafer and Mr. Adamson's attorneys—William Feldhacker and Gregory Martin—discussed the possibility that Mr. Adamson might still be called on to testify in the one case covered by the plea agreement that had not yet gone to trial, "the

⁴ In the trial of Max Dunlap and James Robison for the killing of Don Bolles, with the State's concurrence, Mr. Adamson invoked his Fifth Amendment privilege against defense cross-examination regarding several apparently collateral minor crimes as to which he had not been granted immunity. See JA 144; State v. Dunlap, supra, 608 P.2d at 42. The State has never claimed that this claim of privilege was a violation of the plea agreement.

attempted arson of the Ashford Plumbing Company in Phoenix." Affidavit, Exhibit 1 to Memo Supporting Petition, Adamson v. Hill, U.S. D.C. Ariz. No. 80-502 PHX CAM. Accordingly, before Judge Birdsall, Mr. Schafer stated on the record that "it has been discussed with counsel and I believe counsel has discussed with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony." JA 47-48. Mr. Feldhacker and Mr. Martin agreed. Ibid. 5

The next day, Mr. Adamson was transferred to federal custody (JA 143), as the plea agreement had indicated would occur at "the conclusion of [Mr. Adamson's] . . . testimony in all of the cases in which [he] . . . agrees to testify as a result of this agreement." JA 199. While in federal custody, Mr. Adamson continued to provide information and testimony in a number of federal prosecutions over the ensuing year. JA 143-144.

5. Mr. Adamson's Alleged Violation of the Agreement.

On February 25, 1980, the convictions and death sentences imposed on Max Dunlap and James Robison for the killing of Don Bolles were reversed by the Arizona Supreme Court, because of limitations placed on the defendants' cross-examination of Mr. Adamson at their trial. State v. Dunlap, supra; State v. Robison, 608 P.2d 44 (Ariz. 1980). Shortly thereafter, Mr. Adamson learned that Mr. Schafer had indicated to a newspaper reporter that further negotiations with Mr. Adamson were antici-

pated. JA 144.6 Subsequently, Mr. Adamson consulted his attorneys regarding his responsibilities under the plea agreement. JA 144. Mr. Adamson's attorneys informed him that, in their opinion, his obligations under the agreement had ended. JA 144; see JA 52, 91.

On April 2, 1980, one of Mr. Adamson's attorneys, Mr. Feldhacker, was contacted by one of the State's attorneys requesting an interview with Mr. Adamson. JA 200. In response to this request, Mr. Feldhacker wrote a letter the next day, stating:

John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona. It is, therefore, his position that future testimony in any case involving the defendants Max Dunlap and James Robison regarding the killing of Don Bolles will only be given upon the offer of further consideration by the State of Arizona.

JA 201. The letter went on to the state that Mr. Adamson was "aware of the fact that [the prosecutor's] . . . office may feel that he has not completed his obligations under the plea agreement . . . and . . . may attempt to withdraw that plea agreement from him." Ibid. But it

re-emphasize[d] the point that it is Mr. Adamson's position that he has fully and completely, and in good faith, fulfilled all his obligations under the plea agreement. The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing.

JA 203.

The body of the letter set out the terms under which Mr. Adamson was willing to testify. See JA 201-203. As

⁵ After the sentencing, Mr. Schafer and Mr. Feldhacker had a conversation in which Mr. Schafer indicated that he was not sure what the State would do if the *Dunlap* and *Robison* convictions were reversed on appeal now that Mr. Adamson had been sentenced. Affidavit, Exhibit 2 to Petitioner's Response to Motion to Dismiss Petition, *Adamson* v. *Hill*, supra.

⁶ See the Arizona Republic, March 9, 1980, page B-1; Phoenix Gazette, March 13, 1980, 1st home ed., pages A1, A4.

summarized by the Court of Appeals, they were the following:

(1) release from custody after testifying; (2) to be held in a non-jail facility with full-time protection during the retrials; (3) a complete set of clothing; (4) protection for his ex-wife and son; (5) an educational fund for his son; (6) transportation and funds for establishing a new identity outside of Arizona; and (7) full and complete immunity for all crimes in which he may have been involved, stipulating that none were murders.

JA 180, n.2. In response to Mr. Feldhacker's letter, Mr. William Schafer wrote back stating that, because of Mr. Feldhacker's letter, Mr. Adamson had violated the agreement and was subject to prosecution for the Bolles murder. JA 205.

On April 18, 1980, Mr. Adamson was called to testify in pretrial proceedings in the *Dunlap* and *Robison* case, before Judge Robert L. Myers of the Maricopa County Superior Court. JA 50. In response to questions, on advice of counsel, Mr. Adamson invoked his Fifth Amendment privilege against self-incrimination. JA 50-51, 147. Judge Myers initially overruled the claim of privilege, and ordered Mr. Adamson to answer, until Mr. Feldhacker explained his belief that Mr. Adamson was "now, pursuant

to correspondence from the prosecution, subject to being prosecuted for the killing of Don Bolles on a first degree murder charge." JA 50.

[T]he letter is already in the Court file that I have received from the Attorney General's office. Obviously it is their position under paragraph 3 that a refusal of John Adamson to submit to interviews is a violation of the plea agreement and, as the letter carries on, it talks not only about prosecuting John Adamson for the killing of Don Bolles, but prosecuting him for many other crimes as well.

JA 51.8 After hearing this argument, Judge Myers reversed himself and declined to order Mr. Adamson to answer the questions. JA 53.

The Attorney General's office next filed a motion to compel, requesting that Judge Myers order Mr. Adamson to testify pursuant to the plea agreement. JA 54-55. Assistant Attorney General Stan Patchell argued that Mr. Feldhacker's position—that the plea agreement "has been fulfilled"—was incorrect and urged Judge Myers to "construe the agreement . . . and make a ruling and a determination as to whether or not Mr. Adamson must testify." JA 57.9 Judge Myers denied the State's motion.

⁷ Mr. Schafer's letter, which was dated April 9, 1980, stated that: On April 9, the state did call upon Mr. Adamson, through you, for an interview regarding his testimony at the trial. As Mr. Adamson's attorney you refused to allow him to be interviewed.

JA 205. Mr. Feldhacker's letter had referred to a "telephone conversation of April 2, 1980, wherein we discussed the availability of John Adamson for interviews" JA 200. Throughout the remainder of the parties' arguments and pleadings, the only "refusal" pointed to is the letter by Mr. Feldhacker. See, e.g., JA 79, 94-5. Respondent is not aware of any April 9 "refusal" to permit an interview. The reference to the call of April 9 in Mr. Schafer's letter may well refer to the April 2, 1980 conversation that preceded Mr. Feldhacker's letter.

⁸ Mr. Feldhacker also made it clear to Judge Myers that it was his position that "Judge Birdsall . . . must preside over the actual question of whether or not that plea agreement has been completed, whether or nor the State is in violation of the agreement, whether or not John Adamson is in violation of the agreement . . ." JA 52. Since the State had not filed any motion in front of Judge Birdsall, Mr. Feldhacker argued that "I don't think anyone at this point in time has jurisdiction over that plea agreement . . ." JA 61.

⁹ In his argument, Mr. Patchell himself appeared uncertain about the implications of Mr. Adamson's action. He argued, "It is at least contempt on the part of Mr. Adamson to refuse to testify at this point, if not a complete violation of the plea agreement." JA 56. He asked the court to construe the agreement "so that the witness Adamson may know whether or not he is in violation of the plea agreement and whether or not he is compelled to testify pursuant to the plea agreement at this hearing." JA 57.

JA 58. Mr. Adamson then declined to answer questions, stating that he was "taking the Fifth Amendment on advice of counsel," and refusing to testify "[u]nder the circumstances. . . ." JA 58-59. 10 The State sought review of Judge Myers' ruling by the Arizona Supreme Court, but that court declined jurisdiction. JA 111.

6. The Reinstitution of Capital Murder Charges, And The Proceedings in the Arizona Supreme Court.

On May 8, 1980—while John Adamson remained in custody, serving his sentence for the killing of Don Bolles—the State filed a new "Information" charging him with first degree murder for that same crime. JA 62, 68. Mr. Adamson's lawyers moved to quash that Information. JA 64. In their motion to quash, Mr. Adamson's attorneys again contended that the matter could only be appropriately ruled on by Judge Birdsall, the sentencing judge. JA 76. On May 12, 1980, Judge William French denied the motion to quash, noting that the question of whether Mr. Adamson had breached the plea agreement could be determined at a later date. JA 64-65, 90, 99-100.

The next day, Mr. Adamson's attorneys sought review of Judge French's ruling by the Arizona Supreme Court. JA 63-66. In their application to the Arizona Supreme Court, they contended that the new Information violated Mr. Adamson's double jeopardy rights, and that it was improper for the State to proceed with the prosecution without "first obtain[ing] a competent legal ruling as to whether or not JOHN HARVEY ADAMSON is in viola-

tion of his plea agreement prior to proceeding with the prosecution of him." JA 70. The State's answer argued that it was unnecessary to bring the matter before Judge Birdsall, and urged the State Supreme Court to take jurisdiction to determine "whether petitioner is obligated to testify under his agreement." JA 78-79. Mr. Adamson's lawyers then moved to dismiss the Special Action, without success. JA 80-81.

On May 28, 1980, oral argument was held before the Arizona Supreme Court. JA 88. In that argument, Mr. Feldhacker explained to the court his belief and advice to Mr. Adamson that his obligations under the plea agreement had ended with his sentencing (JA 91), with the limited and specific exception of the Ashford Plumbing case (JA 93). He also explained that Mr. Adamson's assertion of his Fifth Amendment rights before Judge Myers resulted from the notice to him, by Mr. Schafer's letter of April 9, 1980, "that he was subject to being prosecuted, not only for the killing of Don Bolles, but for any other crimes that they may find he had previously been given immunity for." JA 94. Mr. Feldhacker also informed the court that

There's a lot of explanation and a lot of things that go beyond the mere statements here, and . . . the record is legally inadequate for this court to make any rulings as to whether or not John Adamson was in violation of any agreement, because there is not any record as to what happened, what that means, any testimony, anything at all before this Court other than what I have raised in my petition.

JA 93. For the State, Mr. Schafer responded by pointing out the colloquy at Mr. Adamson's sentencing regarding discussions of the possible necessity of further testimony (JA 101), without directly addressing Mr. Feldhacker's contention that those discussions had been limited to the Ashford Plumbing case. Mr. Schafer also argued that

¹⁰ Mr. Adamson said this twice. When questioned about the meaning of his response, "I am taking the Fifth Amendment on advice of counsel," he specified that it was "an answer as to why [he was]... taking the Fifth Amendment...." JA 58-59. When asked whether his invocation of the Fifth Amendment applied to "all interviews, depositions, hearings, and trials," he twice stated: "Under the circumstances, yes." JA 59.

there was no need for a hearing to determine Mr. Adamson's breach (JA 94-95), and no reason to resubmit the matter to Judge Birdsall (JA 97-98), because the plea agreement called for "automatic" reinstatement of the charges (JA 99).

The next day, May 29, 1980, the Arizona Supreme Court issued an opinion which remanded Mr. Adamson for prosecution on the original Information charging open murder. JA 105-115. Rejecting Mr. Feldhacker's argument that paragraph 8 of the plea agreement terminated obligations for further testimony at the time of sentencing, the court quoted the colloquy at Mr. Adamson's sentencing, and said this:

If item 8 specifically appears to limit the availability of the petitioner for additional testimony, the foregoing exchange at the sentencing hearing amounted to a clear understanding that Adamson would testify after sentencing.

JA 113. The Arizona Court's decision made no mention of Mr. Feldhacker's representation that the only matter "discussed with counsel" prior to the sentencing was the still-unprosecuted Ashford Plumbing case. Stating that "[t]he record before us is replete with indications of petitioner's refusal to testify further in the Bolles murder cases" the court concluded that "Petitioner has violated the terms of the plea agreement." JA 111, 113. The court then went on to reject Mr. Adamson's claim that his reprosecution would violate his double jeopardy rights, holding that the "plea agreement . . . by its very terms waives the defense of double jeopardy if the agreement is violated." JA 115.

7. Mr. Adamson's Offer to Comply With the Agreement.

The Arizona Supreme Court's decision constituted the first judicial determination that Mr. Adamson was obligated to testify in the *Dunlap* and *Robison* retrials by the plea agreement. The next business day after it was filed, June 2, 1980, Mr. Adamson "renewed his offer to testify at the co-conspirators' retrial, under the terms of the original plea agreement." JA 165. As Mr. Adamson later related, the prosecutors refused:

The following Monday—Monday, June—June 2nd, I called my lawyers and it was arranged to—Stan Patchell from the Attorney General's Office was present in their office. I stated that while I felt uncomfortable from a legal standpoint, particularly a due process standpoint, and I felt that jeopardy had attached at the time of my sentencing, that the only right thing for me to do under the circumstances, since there now in fact had been a judicial determination that the plea agreement had been violated, was to continue the cooperation.

I told my lawyers, reinstate the 20 year plea agreement, give me enough immunity so I can answer the questions, and we'll continue prosecuting the case.

The State found that unacceptable. They demanded a life sentence of 25 years. Now, instead of saying please they were saying thank you by adding nine years onto my sentence.

JA 148. The State, instead, elected to dismiss the charges against Mr. Dunlap and Mr. Robison¹², and proceeded with the prosecution of John Adamson for first degree murder. JA 165.

¹¹ The record items before the Arizona Supreme Court which contained an "indication[] of petitioner's refusal to testify" were the exchange of letters between Mr. Feldhacker and Mr. Schafer, and the partial transcript of the hearings before Judge Myers. See JA 79.

¹² The prosecutions against Dunlap and Robison were dismissed without prejudice as to refiling. See *Dunlap* v. *Corbin*, 9th Cir. No. 81-5054 (1982).

Mr. Adamson's lawyers then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of Arizona, seeking to bar Mr. Adamson's prosecution on double jeopardy grounds. JA 116. That Petition was dismissed as frivolous and Mr. Adamson's request for an evidentiary hearing on it was denied. JA 132, 133-137. The dismissal was later affirmed in an unpublished opinion by a panel of the Court of Appeals for the Ninth Circuit. JA 156-163; Adamson v. Hill, 667 F.2d 1030 (9th Cir, 1981) [table], cert. denied 455 U.S. 992 (1982).

8. Mr. Adamson's Trial and Death Sentence.

Mr. Adamson's trial began on October 7, 1980. 13 After several days of trial and lengthy jury deliberations, he was convicted of first degree murder. State v. Adamson, supra. The judge presiding at the trial was Judge Birdsall, and under Arizona law sentencing on this capital charge was his prerogative alone. Ariz. Rev. Stat. § 13-703.

At the sentencing hearing, the State rested its request for the death penalty on the circumstances of the crime. Reporters Transcript, State v. Adamson, Nov. 14, 1980, at 14-15. In mitigation, Mr. Adamson introduced evidence of his ongoing cooperation with law enforcement officials in past and pending criminal investigations. Two Assistant United States Attorneys, a special agent for the Federal Bureau of Investigation, and an officer with the Organized Crime Bureau of the Phoenix Police Department, all testified about the extent and value of Mr. Adamson's cooperation in these cases. Id. at 16-39. Mr. Adamson's cooperation in these cases. Id. at 16-39. Mr. Adamson's cooperation in these cases.

son himself made a lengthy statement, expressing his remorse "for the unimagined pain, suffering and loss" he had caused (JA 152), his belief that he had never violated the plea agreement (JA 145-8), ¹⁴ and his continued willingness to testify against the others involved in the Bolles murder and other crimes (JA 152-3). ¹⁵

In his sentencing decision, Judge Birdsall found two statutory "aggravating circumstances" in the facts surrounding the murder of Don Bolles: that the crime was committed for "pecuniary gain," and was "heinous, cruel or depraved," making Mr. Adamson eligible for a death sentence under Ariz. Rev. Stat. § 13-703 (F)(5), and (6). Special Verdict, State v. Adamson, Nov. 14, 1980, at 2-3. Although he acknowledged that Mr. Adamson "has cooperated with the United States government and with the State of Arizona in criminal cases and in criminal investigations, [and] that at least some of these cases and investigations involve serious criminal activity, [and] that some of these matters are still pending and that the Defendant states that he is willing to continue this cooperation," Judge Birdsall found these mitigating circumstances were not "sufficiently substantial to warrant leniency," and imposed a sentence of death. Id. at 3. The

¹³ Prior to this trial, Mr. Adamson renewed his offer to testify against Mr. Dunlap and Mr. Robison, on terms substantially harsher to him than those of the original plea agreement. JA 149. His offer was again rejected by the Arizona prosecuting authorities. JA 150.

¹⁴ Mr. Adamson's statement emphasized that he had taken the position that his obligation to testify had end d on advice of counsel, and had anticipated that "there was going to be hearing certainly over the legal issue of where everybody stood according to the agreement" before he was held in breach. JA 144. He also said the following about his demands for additional consideration after the reversal of the Dunlap/Robison convictions: "I asked for the moon and I don't know what the usual process is for negotiating a plea agreement, but that's the way I started with it. It may be considered untutored, and perhaps it was in error, but it was done in good faith." JA 145.

¹⁵ Even during the trial itself, Mr. Adamson continued to cooperate in federal prosecutions, testifying in one federal criminal case during the weeks between his trial and sentencing. JA 148-149.

Supreme Court of Arizona affirmed both conviction and sentence, one Justice dissenting. State v. Adamson, 665 P.2d 972 (Ariz. 1983).

9. The Habeas Corpus Proceedings Below.

After state remedies were exhausted, Mr. Adamson filed another federal habeas corpus petition seeking relief from his conviction and sentence of death. JA 164. He again challenged his conviction and death sentence as a violation of "the Fifth, Eighth and Fourteenth Amendments," in light of his previous sentence of imprisonment for the same crime. JA 164. His Petition affirmatively alleged that he had attempted to obtain additional consideration for his testimony in the Dunlap retrial, which "he believed was not contemplated by the initial plea agreement," and that after the Arizona Supreme Court's decision, he had "renewed his offer to testify at the coconspirator's retrial, under the terms of the original plea agreement." JA 165. The State's answer did not directly address these contentions. See Answer at 8, Adamson v. Ricketts, CR 23.

In District Court, Mr. Adamson moved for an evidentiary hearing into the facts underlying this claim, and his attorneys sought the appointment of new counsel because they were witnesses to these events. JA 167-173. Both motions were denied by the District Court, in an Order dismissing the habeas corpus petition without a hearing. See Order at 12-13, Adamson v. Ricketts, CR 24. It was this Order that was reversed by the en banc Court of Appeals. Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986).

SUMMARY OF ARGUMENT

John Harvey Adamson's first degree murder conviction and death sentence were imposed for a crime as to which he had already pled guilty, and for which he had been sentenced and spent over three years in prison. Clearly, this violated the Double Jeopardy Clause of the fifth amendment unless something Mr. Adamson did removed its protections.

The Court of Appeals properly held that, in this context, the appropriate standard for determining whether the protections of the Double Jeopardy Clause have been forfeited is the traditional one, applicable generally to federal constitutional rights: a voluntary, knowing and intelligent waiver.

The finding by the Court of Appeals that no such waiver occurred here did not disregard any factual findings made by the state courts. The determination of whether federal constitutional protections apply, or have been removed, is inevitably a question of federal law, on which federal courts cannot defer to a state court's determination. The state did not argue in the Court of Appeals that the Arizona State Court had found as a fact that Mr. Adamson "understood" his actions were waiving his double jeopardy rights. A fair reading of the Arizona Supreme Court opinion from which the Solicitor General would extrapolate that finding shows that the Arizona court was speaking of a distinct, state law contract issue, whose resolution required no inquiry as to Mr. Adamson's actual state of mind. The material facts regarding Mr. Adamson's beliefs and intendment were not developed in state court. The Court of Appeals correctly found that the present record overwhelmingly supports Mr. Adamson's allegation, in his habeas corpus petition, that the testimony for which he attempted to obtain additional consideration "he believed was not contemplated by the initial plea agreement." JA 165.

What this case is all about is nothing more or less than the consequences of a legitimate disagreement between the prosecution and a defendant who pleads guilty and

9

turns state's evidence, regarding the construction of the plea bargain between them. Mr. Adamson requested new concessions for his testimony in the honest and reasonable belief that he had already performed the terms of the plea bargain in full by testifying as a prosecution witness on several earlier occasions, and that the additional testimony now sought was beyond the scope of the bargain. He directly refused to answer questions when called, because the prosecution had asserted he was already in breach of the agreement, and subject to reprosecution. The state judge presiding at that time held that Mr. Adamson's claim of privilege was justified. Mr. Adamson persisted in his position only until the Arizona Supreme Court issued a ruling which rejected his construction of the plea bargain and held that it did require him to testify again. Then, while there was still ample time for him to testify, he offered to do so; and he has since stood ready and willing to abide by the agreement as judicially construed.

It is undisputed and indisputable that Mr. Adamson's refusal to testify was only temporary; it was explicitly based upon the advice of counsel and upon a plausible, good-faith interpretation of the plea agreement; it was abandoned immediately as soon as that interpretation was adjudicated to be incorrect; and it never deprived the prosecution of the benefit of the plea agreement or prejudiced the prosecution in any other way. Under these circumstances, it can hardly be said that the decision of the Court of Appeals below "renders plea agreements... almost entirely unenforceable by the government, at least to the extent they impose future obligations on the defendant." Sol. Gen. Br. 24.

All that the Court of Appeals held was that Mr. Adamson could not be placed a second time in jeopardy of life upon the fiction that he had "waived" the constitutional right to double jeopardy by disavowing the very plea bargain upon which his legal position rested, and which he

has always said that he intended fully to obey. All that its decision gave Mr. Adamson is what the Solicitor General concedes will fully satisfy every justifiable governmental interest in the bargain: the opportunity, before being stripped of the fifth amendment protection, and ultimately of his life, to "comply with the terms of the agreement," after they had been "settled" by a court, at least "as long as the value of the defendant's cooperation has not diminished during the recalcitrance." Sol. Gen. Br. at 21n.11.

The ability of the government to obtain defendants' cooperation would be substantially undermined by a holding that—even after a sentence has been imposed and extensive cooperation has been given—any dispute with the government can result in a loss of all the benefits of a plea bargain, a waiver of double jeopardy, reprosecution, and even death. In the long run, the government's ability to bargain for testimony is enhanced, not undermined, by safeguards against prosecutors' overreaching. The government's ability to ensure that cooperation agreements are obeyed can easily and adequately be protected by the common practice of deferring acceptance of a cooperating defendant's plea, or the imposition of sentence on him, until after his testimony is completed.

ARGUMENT

I. THE PROTECTIONS AFFORDED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT CAN BE FORFEITED ONLY BY A CRIMINAL DEFENDANT'S KNOWING AND VOLUNTARY ACTION.

There is no question that, after John Harvey Adamson was sentenced to prison for the murder of Don Bolles, the Double Jeopardy Clause of the fifth amendment stood as a bar to his reprosecution for that same crime. See Arizona v. Rumsey, 467 U.S. 203 (1984); Brown v. Ohio, 432 U.S.

161 (1977). The Arizona Supreme Court itself agreed "that at the time [Mr. Adamson] . . . was sentenced jeopardy attached," Adamson v. Superior Court, 611 P.2d 932, 937 (Ariz. 1980) (JA 115), and petitioner does not dispute this. The question presented here, then, is whether something Mr. Adamson did after his sentencing deprived him of the double jeopardy protection he had acquired.

The Court of Appeals' opinion assumed that this question is governed by waiver principles that have long been axiomatic of this Court's constitutional jurisprudence:

"'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461 (1938) ... Before finding that a defendant has waived a right, a court must be convinced that there was "'an intentional relinquishment or abandonment of a known right or privilege." U.S. v. Anderson, 514 F.2d 583, 586 (7th Cir. 1975) quoting Zerbst, 304 U.S. at 464, 58 S.Ct. at 1023). In situations involving other constitutional rights, we have required a finding that the defendant's waiver was "made voluntarily, knowingly, and intelligently." U.S. v. Cochran, 770 F.2d 850, 851, (9th Cir. 1985) (waiver of right to jury trial). Furthermore, given the importance of the right, such waiver must be made expressly, rather than implied by conduct. Cf. Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam) (will not imply waiver of double jeopardy rights from guilty plea in second prosecution).

Adamson v. Ricketts, supra, 789 F.2d at 727; JA 186. Both petitioner and the Solicitor General fault this analysis, arguing that this Court has held that the rights protected by the Double Jeopardy Clause can be forfeited without the "knowing and intelligent" waiver required to with-

draw other rights protected by the Constitution. Pet.Br. 18; Sol. Gen. Br. 11, 14.

This Court has said exactly the opposite, that it has "applied the Johnson criteria to assess the effectiveness of a waiver of . . . the right to be free from twice being placed in jeopardy." Schneckloth v. Bustamonte, 412 U.S. 218, 237-8 (1973), citing Green v. United States, 355 U.S. 184 (1957). The Court also squarely refused to imply a waiver of double jeopardy rights in Menna v. New York, supra. Virtually every federal Circuit has agreed with the Court of Appeals' position here—that asserted waivers of double jeopardy rights are to be measured by the same Johnson v. Zerbst standard that controls waiver issues implicating virtually all other individual rights protected by the Constitution. 16

The arguments made here to the contrary rest on truncated quotations, taken from decisions of this Court applying the Double Jeopardy Clause in wholly different contexts, contexts in which the Court has held the very concept of "waiver" inapposite. These cases "implicitly rejected" a waiver analysis of questions regarding "the permissibility of a retrial following a mistrial or reversal of

¹⁶ See, e.g., United States v. Anderson, supra, 514 F.2d at 586; Hoffer v. Morrow, 797 F.2d 348, 350 (7th Cir. 1986); Launius v. United States, 575 F.2d 770, 772 (9th Cir. 1978); United States v. Rich, 589 F.2d 1025, 1032 (10th Cir. 1978); United States v. Young, 503 F.2d 1072, 1075 (3rd Cir. 1974); Galloway v. Beto, 421 F.2d 284, 288 n.4 (5th Cir), cert. denied. 400 U.S. 912 (1970); Oksanen v. United States, 362 F.2d 74, 81 (8th Cir. 1966); and see United States v. Broce, 781 F.2d 792, 795 (10th Cir. 1986) (en banc) (holding that the Double Jeopardy Clause is an "absolute" inhibition upon the government's right to institute a proceeding in certain circumstances, and not an "individual right which is subject to waiver.") See also e.g., Turner v. United States, 459 A.2d 1054, 1056 (D.C. Ct. of App. 1983); Carbaugh v. State, 449 A.2d 1153, 1155 (Md. 1982); State v. Cain, 324 So.2d 830, 834 (La. 1975).

a conviction on appeal," *United States* v. *Dinitz*, 424 U.S. 600, 609 n.11 (1976), not for all purposes relating to the Double Jeopardy Clause.

The cases involving mistrials or the appeal of a conviction turn on special aspects of double jeopardy analysis presented by those situations that make the idea of "waiver" ill-fitted to solve them. First, the cases recognize that the idea of "waiver" in that context is "wholly fictional." Green v. United States, supra, 355 U.S. at 192. "'Usually no such waiver is expressed or thought of.'" Ibid., quoting Kepner v. United States, 195 U.S. 100, 135 (1904) (dissenting opinion of Justice Holmes). Second, they understand that, from the defendant's point of view the "choice" expressed by an appeal or mistrial motion is "no meaningful choice" at all. Green v. United States, supra, 355 U.S. at 192. "In such circumstances the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error." United States v. Dinitz, supra, 424 U.S. at 609. Third, they have perceived that there are implications to values protected by the Double Jeopardy Clause on both sides of that "Hobson's choice," but no core double jeopardy concerns on either: by electing to request a new trial, the defendant does not give up a "constitutional right comparable to the right of counsel" involved in Johnson v. Zerbst, but simply a corollary "interest in going forward before the first jury," id. at 424 U.S. at 609 n.11; and he gains some "protection against multiple prosecutions" by "the concomitant relinquishment of the opportunity to obtain a verdict from the first jury," ibid. Finally-although the Court has not fully clarified the law on this score—it is possible that, in situations involving mistrials or appellate reversals, the defendant is not "twice put in jeopardy" at all because the "criminal proceedings against an accused have not run their full course." Price v. Georgia, 398 U.S.

323, 326 (1970); see Richardson v. United States, 468 U.S. 317, 325 (1984); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 308 (1984).

The situation here has none of these attributes that make "waiver" analysis inappropriate. Here, what has been at issue from the beginning is whether John Adamson "waive[d] the defense of double jeopardy " Adamson v. Superior Court, supra, 611 P.2d at 937; JA 115. Mr. Adamson did not request a mistrial, appeal, withdraw his guilty plea or in any way attempt to undercut the finality of his original conviction and sentence. 17 He obtained no benefit for his alleged implicit waiver. What he lost was not just some corollary constitutional "interest," but one of the most basic protections of the Double Jepoardy Clause—the protection "against a second prosecution for the same offense after conviction," Brown v. Ohio, supra 432 U.S. at 165. For with the entry of judgment and sentence against him, with no right to appeal, the "criminal proceedings against [Mr. Adamson]

¹⁷ It is this fact that distinguishes the cases cited by petitioner and the Solicitor General, which hold that a retrial on all original charges is permissible after defendant successfully moves to vacate a guilty plea to a lesser charge. See Pet. Br. 26; Sol. Gen. Br. 15. We have no quarrel with these cases. They properly recognize that in these circumstances it is only the defendant's guilty plea to the conviction offense that causes him to be "put in jeopardy" at all. By choosing to vacate that conviction, the defendant necessarily elects to erase the precise legal event that would otherwise provide him with double jeopardy protection. Thus, such a motion can only be construed as a "deliberate election" to forgo double jeopardy rights. See Lowery v. Estelle, 696 F.2d 333, 340 (5th Cir. 1983); Klobuchir v. Pennsylvania, 639 F.2d 966, 970 (3d Cir. 1981); Hawk v. Berkemer, 610 F.2d 445. 447-8 (6th Cir. 1979); United States v. Johnson, 537 F.2d 1170, 1174 (4th Cir. 1976); United States v. Jerry, 487 F.2d 600, 606 (3d Cir. 1973); Ward v. Page, 424 F.2d 491, 493 (10th Cir. 1970); United States v. Myles, 430 F.Supp. 98, 101-102 (D.D.C. 1977).

... ha[d] run their full course." Price v. Georgia, supra, 398 U.S. at 326.18

This Court's cases rejecting "waiver" analysis in these different contexts thus are not in point here. The circumstances of this case presented a classic waiver issue—and the state, district and circuit courts have all evaluated it in those terms. 19

Ultimately, however, we believe the same basic principle—the presumption against the loss of constitutional rights unless a defendant has chosen to forfeit them—controls this case, "whatever the rationalization," Green v. United States, supra, 355 U.S. at 189. Even in the cases where the Court has abjured a formal "waiver" analysis, it nevertheless has made the protections of the constitution turn on the defendant's "voluntary choice," United States v. Scott, 437 U.S. 82, 99, (1977), removing them from him only upon "a deliberate election on his part to forego his valued right," id. at 437 U.S. 93. See Oregon v. Kennedy, 456 U.S. 667, 676 (1982). It has allowed multiple trials only in "situations in which the defendant is responsible

for the second prosecution," United States v. Scott, supra, 437 U.S. at 96, emphasizing that is what the defendant "expressly asks for" and "elects to have," Jeffers v. United States, 432 U.S. 137, 152 (1977) (plurality opinion). And it has made this clear: "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed" United States v. Dinitz, supra, 424 U.S. at 609; see Oregon v. Kennedy, supra, 456 U.S. at 676, and id. at 683 (concurring opinion of Justice Stevens).

We do not read these cases, as petitioner would, to give the Double Jeopardy Clause second class status among the protections of the Bill of Rights. We believe they show the same regard for its protection—one "clearly 'fundamental to the American scheme of justice'", based upon principles that "from the very beginning [have] been part of our constitutional tradition," Benton v. Maryland, 395 U.S. 784, 796 (1969)—that the Court has shown for other fundamental constitutional guarantees, before and since Johnson v. Zerbst. Whether it is called a "waiver" or an "election," whether the decision must be characterized as "intentional," "knowing," "deliberate," or simply "voluntary," the question is essentially the same. The Court of Appeals did not err in posing that issue here in those terms.

II. THE COURT OF APPEALS' DECISION DID NOT CONTRAVENE ANY FACTUAL DETERMINATION MADE BY THE SUPREME COURT OF ARIZONA WHICH WAS ENTITLED TO DEFERENCE UNDER 28 U.S.C. § 2254 (d).

The Court of Appeals was cognizant of its responsibility, in this habeas corpus proceeding, to defer to state court factual determinations, but to decide federal constitutional issues for itself:

on an explicit finding under Ariz. R. Crim. Pro. 17.4(d), that such a sentence was "appropriate," effectively amounted to "a resolution" of Mr. Adamson's case, United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977), and carried qualitatively different double jeopardy implications than the imposition of a prison sentence in a non-capital case. Bullington v. Missouri, 451 U.S. 430 (1980); Arizona v. Rumsey, supra. In that aspect, too, this case is distinguishable from the guilty plea cases petitioner relies on, which are governed by different rules of North Carolina v. Pearce, 395 U.S. 711 (1969). See, e.g., United States v. Whitley, 759 F.2d 327, 331 (4th Cir. 1985); United States Ex Rel. Williams v. McMahon, 436 F.2d 103, 106 (2d Cir. 1970) cert. denied 402 U.S. 914 (1971).

¹⁹ See Adamson v. Superior Court, supra, 611 P.2d at 937 (JA 115);
Adamson v. Hill, U.S.D.C. Ariz. CIV 80-502 PHX CAM (JA 136);
Adamson v. Ricketts, supra, 789 F.2d at 727, 729 (JA 185-186).

The Arizona Supreme Court's finding of a waiver does not preclude this court's own inquiry into that issue. Whether Adamson's actions constituted a waiver of a constitutional right is determined by federal law. Gladden v. Unsworth, 396 F.2d 373, 376 (9th Cir. 1968). In a habeas review a federal court must presume the correctness of a state appellate court's finding of fact unless one of the seven circumstances provided for in 28 U.S.C. § 2254(d) is present or if the state court finding of fact is not fairly supported by the record and the federal court provides a written explanation for its conclusion. Sumner v. Mata, 455 U.S. 591, 592-93, 102 S.Ct. 1303, 1304-05, 71 L.Ed.2d 480 (1982) (per curiam).

Section 2254(d), however, applies only to questions of "'basic, primary, or historical fac[t].'" Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6, 83 S.Ct. 745, 755 n.6, 9 L.Ed.2d 770 (1963)). When the issue includes a mixed question of law and fact or questions of law, section 2254(d) does not require giving a presumption of correctness to the state court's findings. See Fendler v. Goldsmith, 728 F.2d 1181, 1190 n. 21 (9th Cir. 1984).

This case presents a mixed question of law and facts. Section 2254(d) applies to "historical" facts, such as whether Adamson signed the agreement, but it does not apply to whether his actions constituted waiver of double jeopardy. See Sumner v. Matu, 455 U.S. at 597, 102 S.Ct. at 1306-07 (questions of fact governed by section 2254(d), but reviewing court may accord "different weight to the facts"); Fendler v. Goldsmith, 728 F.2d at 1190 n.21. Cf. Miller v. Fenton, ____ U.S. ____, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) ("voluntariness of a confession is a matter of independent federal determination").

Adamson v. Ricketts, supra, 789 F.2d 727-28 n.5; JA 187-188. Petitioner and the Solicitor General take different tacks in their effort to fault the Court of Appeals'

position this score. Petitioner contends that it was the state co. t's "determin[ation of] the obligations of the parties" under the plea agreement, and its "conclu[sion] that Adamson had breached the agreement" that were "entitled to a presumption under 28 U.S.C. § 2254(d)." Pet.Br. 14. The Solicitor General focuses on a different point, in its heavily edited discovery of a "definitive factual finding that respondent 'clearly underst[ood]' his obligations "Sol.Gen.Br. at 20 n.10. We do not believe either of these assertions can withstand scrunity; we will address each of them in turn.

A. The Court of Appeals Properly Recognized That There Is a Difference Between the Breach of a State Contract and the Waiver of a Federal Constitutional Right.

The initial flaw in the petitioner's analysis of this issue lies in its confounding of factual and legal issues. Section 2254(d) speaks only to the former; it provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court, a determination after a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and written indicia, shall be presumed to be correct [absent certain circumstances]. . . .

(Emphasis added). The Arizona Supreme Court's determination of the scope of the obligations of the plea agreement was plainly not "a determination . . . of a factual issue" It involved, as even petitioner occasionally seems to acknowledge, legal "conclusions." Pet.Br. at 14. As the Court of Appeals recognized, § 2254(d) simply has no application to "conclusions" and "interpretations" of obligations imposed by state law.

Of course, that does not mean that the Arizona Supreme Court's reading of the plea agreement, as a contract, was not entitled to deference by the federal courts. The Court of Appeals carefully respected the Arizona Supreme Court's "conclusions" insofar as they determined state law obligations. See Adamson v. Ricketts, supra, 789 F.2d at 729 (JA 192). But as both the Court of Appeals and the Arizona Supreme Court saw, two separate legal questions are presented here: one involves the scope of the obligations imposed on Mr. Adamson by the plea agreement; the other involves the extent, and effect, of any waiver of double jeopardy rights that could be implied from the agreement and Mr. Adamson's subsequent actions. See Adamson v. Superior Court, supra, at 611 P.2d 936, 937 (JA 111-113, 115); Adamson v. Ricketts, supra, 789 F.2d at 729-730 (JA 189-190). The Court of Appeals never questioned the Arizona Supreme Court's decision on the first of these issues; but it properly recognized its own independent responsibility to decide the second.

That cannot have been error. "The question of a waiver of federally guaranteed constitutional rights is, of course, a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4 (1964); accord Garrity v. New Jersey, 385 U.S. 493, 498 (1967); Boykin v. Alabama, 395 U.S. 238, 243 (1969); Lefkowitz v. Turley, 414 U.S. 70, 84-5 (1973).20

When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. See e.g. Edwards v. South Carolina, 372 U.S. 229, 235; Blackburn v. Alabama, 361 U.S. 199, 205, note 5.

Brookhart v. Janis, supra, 384 U.S. at 4 n.4. This Court has recently reaffirmed that principle, Miller v. Fenton, 106 S.Ct. 445 (1985), and has never deviated from it.

The ultimate responsibility of the federal courts to answer questions touching on federal constitutional rights is not eliminated because they arise out of a contract. Santobello v. New York, 404 U.S. 257 (1971).²¹ Nor is it reduced by the fact that the federal question is closely related—or even nominally identical—to a parallel state law issue. Events occurring in the course of a state criminal prosecution often have simultaneous state-and federal law implications; the federal questions so presented must nonetheless be independently decided by the federal courts.²² Particularly, this Court has always

²⁰ See also Murray v. Carrier, 106 S.Ct. 2639, 2650 (1986); Wainwright v. Sykes, 433 U.S. 72, 83 n.8 (1977); Lefkowitz v. Newsome, 420 U.S. 283, 290 n.6 (1975); Barker v. Vingo, 407 U.S. 514, 523-9 (1972); North Carolina v. Alford, 400 U.S. 25, 31 (1970); Douglas v. Alabama, 380 U.S. 415, 422-3 (1965); Fay v. Noia, 372 U.S. 391, 438-9 (1963); Townsend v. Sain, 372 U.S. 293, 309 n.6, 318 (1963); Parker v. Illinois, 333 U.S. 571 (1948).

²¹ This general principle long predates Santobello, and is not limited to cases involving plea bargain agreements. In its contract clause decisions, for example—where the federal and state questions of whether a contract obligation existed may be by all appearances identical—the Court has always been careful to keep federal and state law distinct.

The decision of the supreme court of a state construing and applying its own constitution and laws, generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case, this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and likewise, will determine for itself the meaning and application of a state constitution or statutory provisions said to create the contract or by which it is asserted an impairment has been effected.

Coombes v. Getz, 285 U.S. 434, 441 (1932).

²² See Ford v. Wainwright, 106 S.Ct. 2595, (1986) (a capital defendant's competency to be executed, under the Eighth Amendment); Lee v. Illinois, 106 S.Ct. 2056 (1986) (the reliability provided by a hearsay exception, for purposes of the Confrontation Clause); Brown v. Ohio, supra, 432 U.S. at 166 (whether two state statutes define the "same offense," for purposes of the Double Jeopardy Clause); Rogers v.

reserved to itself the ultimate decision of whether a criminal defendant's actions, in light of a procedural rule created and defined by state law, forfeited the protection of the federal constitution. ²³ Just last term, in *Smalis* v. *Pennsylvania*, 106 S.Ct. 1745 (1986), the Court refused to defer to the state court's holding that the defendant's invocation of a state-created "demurrer" procedure constituted an "election" which withdrew any Double Jeopardy Clause bar against a state appeal:

We of course accept the Pennsylvania Supreme Court's characterization of what the trial judge must consider, in ruling on a defendant's demurrer. But . . . the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

106 S.Ct. at 1748 n.5.

The Court of Appeals' treatment of the Arizona Supreme Court's interpretation of the plea agreement was consistent with these principles. To do what petitioner suggests—to make the Arizona Supreme Court determinations of the contract's meaning and breach the major and minor premises of a syllogism inevitably concluding in a waiver of constitutional rights—would be to abandon independent federal review of the latter ques-

tion. It would also confuse two qualitatively distinct bodies of law:

Although unintentional breaches of contract can form the basis for damages in civil contract litigation, such principles are inappropriate to determine whether a defendant in a criminal action has . . . waived a constitutional right.

Adamson v. Ricketts, supra, 789 F.2d at 729. The Arizona Court's decision on the state contract issue did not answer the federal double jeopardy question. The Court of Appeals properly did.

B. The Arizona Supreme Court Did Not Find, and Could Not Properly Have Found, That Mr. Adamson Understood He Was Waiving His Double Jeopardy Rights.

Neither in its arguments to the Court of Appeals nor in its petition or brief here, has petitioner identified in the Arizona Supreme Court opinion any factual findings regarding John Harvey Adamson's actions and intentions which should be presumed correct under 28 U.S.C. § 2254(d). The Solicitor General's brief filed in this Court, however, pulls from context two words in the Arizona Supreme Court's decision, to assert that the court made a "definitive factual finding that respondent 'clearly underst[ood]' his obligations" when he violated them. Sol.Gen.Br. 20 n.10. Petitioner never made that claim below, so the Court of Appeals had no occasion to address it; but because Mr. Adamson's intentions are a key to this case, we will nonetheless address it here.

The passage from which the Solicitor General purports to derive this "finding" appears in the Arizona Court's discussion of the contract issue of "the terms of the plea agreement." Adamson v. Superior Court, supra, 611 P.2d

Richmond, 365 U.S. 534, 540-544 (1961) (voluntariness of a confession under state and federal law). See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-433 (1982) (a determination of whether state law creates a property right for purposes of the due process clause); Liner v. Jafco, Inc., 375 U.S. 301 (1964) (mootness under federal and state law); Great Northern Railway Company v. Washington, 300 U.S. 154, 167 (1937) (the situs of a debt, for purposes of the interstate commerce clause).

²³ See James v. Kentucky, 466 U.S. 341, 348-9 (1984), and cases there cited; Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975), and id. at 300 (dissenting opinion of Justice White).

at 936; JA 111, 113.24 The Arizona Supreme Court has just quoted the colloquy at Mr. Adamson's sentencing, regarding the matters "'discussed with counsel'"; it then goes on to say:

If item 8 specifically appears to limit the availability of the petitioner for additional testimony, the foregoing exchange at the sentencing hearing amounted to a clear understanding that Adamson would testify after sentencing.

JA 113. With punctuation only partly revealing the extent of its editing, the Solicitor General's brief would change this to a "definitive factual finding that respondent 'clearly underst[ood]' his obligations" Sol. Gen. Br. 20n. 10. The discovery of this "finding" obviously requires substantial editorial reworking of the Arizona Supreme Court's language—changing an adjective into an adverb and a noun into a verb; assuming Mr. Adamson is the subject of the verb; assigning the verb a tense fixing it at a different time; and adding Mr. Adamson's "obligations" as its object. More importantly, the Solicitor General's editing produces a fundamental change in the meaning of the passage.

In the context in which the Arizona Supreme Court was writing—the context of contract law—the word "understanding" is a term of art. Like most terms in modern contract law, it speaks to objective factors and says nothing about subjective beliefs:²⁵

"It is not the undisclosed intent of the parties with which we

Understanding. In the law of contracts, an agreement. An implied agreement resulting from the express terms of another agreement, whether written or oral. A valid contract engagement of a somewhat informal character. This is a loose and ambiguous term, unless it be accompanied by some expression to show that it constituted a meeting of the minds of the parties upon something respecting which they intended to be bound. See Agreement, Contract.

BLACK'S LAW DICTIONARY 1369 (5th Ed. 1979). Section 2254(d) neither commands nor permits federal courts to play with words in this fashion, to create a finding of fact on one issue from a state court's pronouncement on another.

If the Arizona Court's statement could be construed as a finding that Mr. Adamson subjectively "understood" he was obliged to testify at the *Dunlap/Robison* retrial when he asserted through counsel he was not, that finding still would not qualify for deference under the standards of 28 U.S.C. § 2254(d). We doubt whether the manner in which it was reached can be called a "full, fair and adequate hearing" under § 2254(d)(6).²⁶ Even if it was, it was on this

are concerned, but the outward manifestations of assent. This principle of law is expressed well by Justice Holmes:
... the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs. . . . 'Holmes, The Path of the Law."

²⁴ The presumption embodied by § 2254(d) does not apply, of course, unless the factual issue decided in state court is the same factual issue presented in the federal habeas proceeding. Cf. Kimmelman v. Morrison, 106 S.Ct. 2574, 2591 (1986).

²⁵ As Justice O'Connor wrote for the Arizona Court of Appeals: A contract is construed in accordance with the intention of the parties as 'judged by objective standards and not by their secret intentions or motives.' Franklin Life Insurance Co. v. Mast, 435 F.2d 1038, 1045 (9th Cir. 1970). Arizona courts have held:

Sam Levitz Furniture Co. v. Safeway Stores, Inc., 10 Ariz. App. 225, 228, 457 P.2d 939, 941 (1969), rev'd on other grounds, 105 Ariz. 329, 464 P.2d 612 (1970).

Helena Chemical Co. v. Coury Bros. Ranches, Inc., 616 P.2d 908, 913 (Ariz. App. 1980).

²⁶ The expedited, open-ended proceedings in the Arizona Supreme Court gave Mr. Adamson's counsel scant notice of the issues that would be decided there, and no real opportunity to "present[] material relevant" to their position or "to challenge or impeach" the

precise point that "the material facts were not adequately developed at the State court hearing " 28 U.S.C. § 2254(d)(3). The Arizona Supreme Court declined Mr. Adamson's counsel's request for the opportunity to present testimony about the events beyond the record that bore on their perception of the obligations imposed by the agreement. JA 93. As a result, that court did not have before it the evidence which shows that the discussions and the "understanding" reflected in the colloquy at sentencing "involved a wholly separate prosecution," Adamson v. Ricketts, supra, 789 F.2d at 727 n.5 (JA 187n.5), as petitioner effectively concedes. Pet. Br. 22.27 Had the Arizona court heard that evidence, surely it would have not inferred a general "understanding" regarding further testimony in the Bolles case and the status of Mr. Adamson's double jeopardy rights from the distinctly different point "discussed with counsel."

Finally, had the Court of Appeals been asked to apply the presumption of § 2254(d) to this newly asserted factual

State's. Cf. Ford v. Wainwright, 106 S.Ct. 2595, 2604-5 (1986). Moreover, in light of the statements that were of record regarding the parties' intendment in the plea agreement and the record that was before the Arizona court, the issue of what Mr. Adamson intended necessarily "turn[ed] on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record." Cabana v. Bullock, 106 S.Ct. 689, 698 n.5 (1986). To make final factual determinations in such hybrid proceedings can hardly satisfy the Court's consistent demand in capital cases "that fact finding procedures aspire to a heightened standard of reliability." Ford v. Wainwright, supra, 106 S.Ct. at 2603.

²⁷ In its brief on Mr. Adamson's first appeal, the state made its concession of this point even clearer, arguing that the colloquy "is not significant": "From the beginning, the state has argued that Adamson's obligation to testify at a retrial was either part of the plea agreement when it was written or it was not. Whatever happened at the formal sentencing a year and a half after the agreement was written could not change that." Resp. [State's] Br. at 15, Adamson v. Hill, (9th Cir. No. 80-5941).

"finding," it doubtless would have concluded that the now suggested finding was "not fairly supported by the record." 28 U.S.C. § 2254(d)(8). The record here contains only two items of direct evidence as to what John Adamson subjectively "understood" his legal obligations were in April, 1980: Mr. Feldhacker's letter of April 3, 1980, and Mr. Adamson's own statement at his death sentencing hearing. The letter said clearly "John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona." JA 201. It said that not once but twice. JA 203. Mr. Adamson said "to me [the sentencing] signaled finality, an end, a time when everybody was satisfied that I had told the truth, that I had done whatever I said in the plea agreement that I was going to do according to the terms of that agreement." JA 142; see also id. at 144-148.

The Arizona Supreme Court never saw Mr. Adamson to evaluate his credibility. The only way it could hold these statements were false would be to decide that the obligations were so clear that no one could possibly misunderstand them. But the only other persons who shared Mr. Adamson's perspective—his attorneys—also shared his belief that "—[t]he plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing." JA 203; see JA 52, 91.²⁸ They

²⁸ Indeed, the record suggests that even the prosecutors involved in the plea agreement were uncertain of the duration of its obligations after sentencing. See n.9, above. Mr. Feldhacker has sworn that Mr. Schafer told him after the sentencing that "he was not sure what he would do if the case against Max A. Dunlap and James A. Robison were reversed on appeal now that John had been sentenced." Exhibit 2 to Petitioner's Response to Motion to Dismiss, Adamson v. Hill, supra. Mr. Schafer's actions seem to reflect this uncertainty: for if there was never any question that Mr. Adamson's obligation to testify continued past his sentencing, why was it necessary to put on the record that possible future testimony in the Ashford Plumbing case had been "discussed with counsel"?

knew, as he did, that both events that the plea agreement had said would occur only "at the conclusion of [Mr. Adamson's]... testimony in all of the cases referred to in this agreement"—the imposition of sentence and Mr. Adamson's transfer to federal custody (JA 197, 199)—had occurred. Their legal research had told them Arizona law permitted jeopardy to be deferred only until the time of sentencing. JA 71.29 They, too, believed that the colloquy at sentencing extended Mr. Adamson's obligations only with regard to the Ashford Plumbing case. JA 92-3.

That belief was not irrational. Seven federal Court of Appeals judges below found that "[l]ogic and common sense support Adamson's position that when the State moved for sentencing, it acknowledged that his obligation to provide further testimony ended." JA 191. If it establishes nothing else, the Court of Appeals' opinion here is itself evidence that the position Mr. Adamson and his attorneys took, if legally erroneous, was an error a reasonable person could make. A finding that no one could possibly have subjectively "underst[ood]" what Mr. Adamson and his lawyers say they did, could not be supported even with the § 2254(d) presumption.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT JOHN ADAMSON DID NOTHING WHICH WARRANTED FORFEITURE OF THE PROTECTIONS OF THE DOUBLE JEOPARDY CLAUSE.

We believe this case is properly decided as the Court of Appeals majority decided it: by a straightforward application of established legal principles to its particular facts. The petitioner and the Solicitor General divert their arguments from the facts and the law, to "policies" which they say are undermined by the result in this case. Before answering their arguments, we will first examine in detail the Court of Appeals' reasoning; we will then turn to the "policies" ostensibly offended by its conclusion.

A. The Court of Appeals' Analysis.

In order to determine whether the State had met its burden of establishing that Mr. Adamson waived his double jeopardy rights, the Court of Appeals majority focused—as petitioner does not—on the particular actions by Mr. Adamson that could be alleged to have worked this forfeiture. The "waiver" has been variously asserted through the course of this litigation to have occurred at three different points: in the plea agreement itself; in Mr. Adamson's counsel's letter of April 3, 1980; and in Mr. Adamson's invocation of his fifth amendment rights before Judge Myers.

1. There can be no serious question that the Court of Appeals was correct in holding that the plea agreement itself did not waive the protections of the Double Jeopardy Clause. For one thing, although both the plea agreement and Judge Birdsall's questioning of Mr. Adamson about it were elaborate in their enumeration of the constitutional rights implicated, it is incontestable that throughout these documents and court proceedings "double jeopardy is not mentioned." JA 189, see JA 30-31, 199. It may or may not be that waiver of double jeopardy rights was implicit in what the plea agreement did say. 30 But as the

Mr. Adamson's lawyers may also have been aware of the long established Arizona rule "that the authority of the court to permit a withdrawal of a plea of guilty is limited to the period prior to the pronouncement of sentence . . . "State v. Barnes, 414 P.2d 149, 150 (Ariz. 1966), quoting State v. Telavera, 261 P.2d 997, 999 (Ariz. 1953) (original emphasis). In any event, that rule obviously supported their belief that the sentencing signalled finality under the plea agreement.

³⁰ A refusal to infer double jeopardy waiver where none is stated would certainly be consistent with this Court's decision in *Menna* v. *New York*, *supra*, and would not "render[] the plea agreement ineffectual and unenforceable from the inception," JA 217-218 (Brunetti,

Court of Appeals further recognized, even if an implied waiver of double jeopardy is assumed, "the most that could be found implied in the plea agreement is that if Adamson did, or refused to do, something in the future, his action or inaction would constitute a waiver of his double jeopardy rights." JA 189. All the references in the plea agreement delineating the circumstances in which it would become "null and void" are written in the subjunctive, and contingent on some future action by the defendant. See JA 195, 196, 198, 199. Nowhere did it contain anything resembling a self-executing double jeopardy waiver.

2. In the Court of Appeals, "[a]t oral argument, the State admitted that Adamson's attorney's letter listing the additional demands in exchange for his testimony was not a breach of the agreement. Rather, [the letter] . . . was Adamson's assertion of his interpretation of the agreement." JA 191. Despite petitioner's concession at this point, however, the Solicitor General argues here that "a defendant who asserts (as [Mr. Adamson] . . . did) a reading of his plea agreement that is no better than arguable "takes the risk" of a double jeopardy waiver. Sol.Gen.Br. at 21.

Even if the contrary had not been conceded, nothing supports that position. Certainly the facts of this case do not: nothing in the agreement remotely suggests that such an assertion through counsel would nullify the agreement or waive Mr. Adamson's double jeopardy rights. Nor is any legal authority suggested for the position. Even under the law of contracts, such an assertionespecially one made on advice of counsel, with substantial legal basis-does not itself suspend the obligation of the other party. New York Life Insurance Co, v. Viglas, 297 U.S. 672 (1936).31 Mr. Adamson never "disclaim[ed] the intention or duty to shape [his] conduct in accordance with the provisions of the contract. Far from repudiating those provisions, [he] appealed to their authority and endeavored to apply them." Id at 297 U.S. at 676.32 Unless the presumption against a waiver of constitutional rights affords less protection than the common law of contracts, the Solicitor General's argument on this point cannot be supported.

3. The issue, then, as the Court of Appeals recognized, turns on Mr. Adamson's assertion of his fifth amendment rights before Judge Myers. But "Adamson's

J., dissenting). Arizona law permits trial judges to defer final acceptance of guilty pleas until the time of sentencing. See Lombrano v. Superior Court, 606 P.2d 15, 16 (Ariz. 1981). Mr. Adamson's lawyers' arguments suggest they understood the plea agreement and Judge Birdsall's action in continuing the case "subject-to-call" (JA 43) to invoke this principle. See JA 71. That meant no waiver of double jeopardy rights was necessary so long as it was understood that, as the Plea Agreement said, Mr. Adamson would "be sentenced at the conclusion of his testimony in all cases referred to in this agreement" (JA 197)—for jeopardy would not attach until the required testimony was provided.

³¹ See Mobley v. New York Life Insurance Co., 295 U.S. 632, 638 (1935); Walker v. Shasta Minerals and Chemical Co., 352 F.2d 634, 638 (10th Cir. 1965); Kimel v. Missouri State Life Ins. Co., 71 F.2d 921, 923 (10th Cir. 1934).

³² It bears repeating here that, contrary to petitioner's representations to this Court, Mr. Adamson's never "stated his intent to prevent the superior court from construing the agreement" Pet.Br. 20. Mr. Feldhacker's letter did not say that; it said "without some type of stipulation, a Superior Court judge will not have any jurisdiction to change, alter, or withdraw Mr. Adamson's plea agreement and/or sentence." JA 204 (emphasis added). Mr. Adamson, and his counsel, continually took the position that there should be a hearing to construe the agreement before Judge Birdsall, the judge who approved it. JA 52, 61, 70; see JA 144. It was the State that successfully resisted having Judge Birdsall construe the agreement before the Arizona Supreme Court ruled on Mr. Adamson's alleged breach. See JA 70-79, 97-98.

refusal to testify at the Dunlap and Robison pre-trial hearings was in direct response to the states' letter purporting to withdraw the protection of the plea agreement." Adamson v. Ricketts, supra, 789 F.2d at 729; JA 191. The record plainly supports this: Mr. Adamson's counsel informed Judge Myers of his understanding that Mr. Adamson was "now, pursuant to correspondence from the prosecution, subject to being prosecuted for the killing of Don Bolles on a first degree murder charge," JA 50; see JA 94. The prosecutors, in their arguments, never said anything to dispel that belief. Mr. Adamson thus answered that he was "taking the Fifth Amendment on advice of counsel." repeating twice that he was doing so "[u]nder the circumstances" JA 58-59. Judge Myers sustained his claim of privilege (JA 53, 58), implicitly upholding his claim that "the circumstances" gave him that legal right.

In no fair sense can that specific, limited claim of privilege be characterized as a waiver which is either "knowing," or "voluntary." Mr. Adamson had no way to "know" that he was forfeiting his constitutional rights, by doing what his counsel advised him to do and what the judge presiding held he could do. Even the prosecutor, in his arguments to Judge Myers, recognized that it was only by a judicial ruling that Mr. Adamson could "know whether or not he is in violation of the plea agreement and whether or not he is compelled to testify pursuant to the plea agreement at this hearing." JA 57.

Nor, in any legal sense, could Mr. Adamson be said to have thus abandoned his double jeopardy protection "voluntarily." The "circumstances" Mr. Adamson confronted involved more than just a "Hobson's choice" between his fifth amendment right to be free from self-incrimination and his protection under the Double Jeopardy Clause. He was faced with a direct assertion by the prosecuting authorities that they believed he was already in violation

and subject to reprosecution. Although the State has since abandoned that assertion, it made it then; and Mr. Adamson's lawyers advised him, and Judge Myers held, that he was within his legal rights to invoke his selfincrimination privilege "under the circumstances" then prevailing. To later hold his claim of privilege was unjustified and constituted a violation of the agreement and a waiver of double jeopardy rights, would be "to sanction the most indefensible sort of entrapment by the State-[penalizing]...a citizen for exercising a privilege which the State clearly had told him was available to him." Raley v. Ohio, 360 U.S. 423, 438 (1959).33 The Court of Appeals correctly held that Mr. Adamson, "faced with the state's letter asserting that he was no longer protected from prosecution, could hardly be expected to forgo the constitutional protection against self-incrimination, especially when the Arizona Supreme Court refused to reverse Judge Myers' decision." JA 192.

4. Of course, as the Court of Appeals also recognized, this might be a different case if Mr. Adamson had not offered to testify under the plea agreement, immediately after the Arizona Court's decision. JA 190, 193. Once that

the defendants claimed the Fifth Amendment privilege before a legislative commission after being advised by the commission chairman that the privilege could properly be invoked. 360 U.S. at 426-427. They were charged with and convicted of contempt for their refusals to answer. 360 U.S. at 424. On appeal from their conviction, the Supreme Court of Ohio "held that the appellants were presumed to know the law of Ohio—[and] that an Ohio immunity statute deprived them of the protection of the privilege—that they therefore committed an offense by not answering the questions as to which they asserted the privilege." 360 U.S. at 425. This Court unanimously held that it violated due process to criminally penalize that claim of privilege, due to the "lack of knowledge by the appellants, because of the commission's action, that they were being considered as unlawfully refusing to answer the questions." 360 U.S. at 437 n.12.

decision clarified his obligation, a refusal to testify would have been a "knowing" and "intentional" act, triggering any implied waiver of double jeopardy rights the plea agreement was read to contain. But Mr. Adamson did offer to testify under the plea agreement on the first business day after the Arizona Court's decision, and before the *Dunlap* and *Robison* prosecutions were scheduled to begin. JA 148. It was the State that then repudiated the plea agreement, responding that it would "consider" having Mr. Adamson testify, only if he would accept a life sentence. Pet.Br. 23; see JA 148.35

Mr. Adamson's offer to testify before the *Dunlap* and *Robison* retrials began made his previous temporary refusal to testify immaterial. Surely, to justify the forfeiture of a constitutional protection, a breach of a plea agreement must be substantial and material. ³⁶ Even in a

purely commercial context, where a "breach is not material, the aggrieved party may sue for 'partial breach' but may not cancel the contract." CALAMARI & PERILLO, THE LAW OF CONTRACTS 408 (2nd Ed. 1977). See Restatement (Second) of Contracts, § 236, comment b; id at § 237, comments b and d.

If the opposite party has performed substantially, the obligor is not released; he must fulfill his commitments and look to a damage remedy . . . he has crossed the threshold; the opposite party's substantial performance keeps him across the threshold; the less than substantial default does not put the obligor back across the threshold into the domain of no commitment.

FRIED, CONTRACT AS PROMISE 122 (1981). Even under the harshest contract theories, an immaterial breach in the performance of a unilateral obligation is excused if a disporportionate forfeiture would otherwise result. Restatement (Second) of Contracts, § 229.37 To hold John Adamson liable to forfeit his rights, and his life, when he had performed all but one of the obligations under the plea agreement, and stood ready to perform that one in time for the State to reap the full benefit of his performance, would diminish the constitutional demand for fairness in capital trials to a stature lower than the settled rules for fair dealing in the commercial marketplace. The Court of Appeals rightly refused to do that.

B. The "Policies" of the Double Jeopardy Clause.

The Solicitor General's brief concludes with an argument that attempts to sail beyond the facts of this case, to argue that some general "policy of the Double Jeopardy

of Appeals' finding on this point as a "glaring misstatement," at the same time petitioner admits it is true. Pet. Br. 23. Mr. Adamson's offer to testify "if he could retain the same sentence he had received under the plea agreement" (ibid.) was, perforce, an offer to comply with his "obligat[ion] under the plea agreement to testify" JA 190. Nothing in the plea agreement or the Arizona Supreme Court's construction of it, supports the State's assertion that it could condition its willingness to go forward with the agreement on Mr. Adamson's acceptance of a substantially more severe sentence. And in fact, even when Mr. Adamson offered to accept such a sentence before the trial, the State again turned him down. JA 149-150.

³⁵ The fact that the State was willing to "consider" this offer belies its later-concocted assertion that Mr. Adamson's credibility was somehow undermined by his unsuccessful request for further consideration. As the Court of Appeals noted, if that really was the State's motivation—which it never claimed at the time—it was a wholly irrational one. JA 193.

³⁶ Examining due process claims similar to that reserved by the Court of Appeals here, several courts have so held, even apart from double jeopardy considerations. See e.g., United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976); Gamble v. State, 604 P.2d 335, 337 (Nev. 1979); State v. Rivest, 316 N.W. 2d 395, 399 (Wisc. 1982).

³⁷ See also e.g., Sahadi v. Continental Illinois National Bank, 706 F.2d 193, 196, 199 (7th Cir. 1983); Burger King Corp. v. Family Dining Inc., 426 F.Supp. 485, 494-495 (E.D. Penn. 1977), aff d. 566 F.2d 1168 (3rd Cir. 1978).

Clause" is offended by the Court of Appeals' decision here. Its argument on this score consists mostly of hyperbolic warnings of the implications for plea bargaining of the Court of Appeals' decision. They have little basis in reality, and no relation to the true policies that the Double Jeopardy Clause of the fifth amendment was intended to enshrine. In fact, the core policies of the Double Jeopardy Clause are exactly what compel the result the Court of Appeals reached here.

The Double Jeopardy Clause "was designed originally to embody the protection of the common law pleas of former jeopardy. . . ." Brown v. Ohio, supra, 432 U.S. at 165. One of those pleas is "autrefois convict." See United States v. Scott, supra, 437 U.S. at 96. That defense—not just some peripheral and secondary double jeopardy protection—is what is at issue here. That defense effectuates "the primary purpose of the Double Jeopardy Clause . . . to protect the integrity of a final judgment, see Crist v. Bretz, [437 U.S. 28, 33 (1978)]," United States v. Scott, supra, 437 U.S. at 92. It was precisely this "constitutional policy of finality for the defendant's benefit," United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality option), Mr. Adamson and his lawyers relied on, and the Court of Appeals enforced. 38



38 Judge Brunetti's dissenting opinion appears to interpret Judge Birdsall's statement that Mr. Adamson would be sentenced "strictly in accordance with the provisions contained in the plea agreement" (JA 224) to make the sentence eternally tentative. This would wholly undermine the double jeopardy finality principle. In context, these comments by Judge Birdsall were obviously directed at the limitations on the severity of sentence he had accepted. See JA 43, 47. We do not believe they carry the implication Judge Brunetti would derive from them; to hold that they did would create a new species of criminal sentence, a sentence asterisked with conditions and never truly final.

Contrary to the Solicitor General's position, a secondary purpose of the Double Jeopardy Clause—to prohibit "governmental oppression," United States v. Scott, supra, 437 U.S. at 91, and "[h]arrassment of an accused by successive prosecutions," Downum v. United States, 372 U.S. 734, 736 (1963)—is also very much involved here. This case may not present "the possibility that even though innocent [the defendant] . . . may be found guilty," Green v. United States, supra, 355 U.S. at 187-188; that concern is generally irrelevant in guilty plea cases. But it no less involves a danger of "prosecutorial . . . overreaching." United States v. Dinitz, supra, 424 U.S. at 607.

A better demonstration of that danger could hardly be imagined than the Solicitor General's position on the balance of power between a defendant and the prosecution under a plea agreement. Under the regime it proposes, a cooperating defendant—whatever his understanding of his obligations, and whatever the extent of his performance-would never have more than the "choice between acquiescing in the government's request and asserting a debatable interpretation of the plea agreement," Sol.Gen.Br. at 22-and would risk losing his double jeopardy rights and all of the benefits of his bargain if his interpretation turns out to be wrong. The government, on the other hand, would not only have the power to intimidate a defendant into accepting its demands; it would also be free arbitrarily to choose, or to refuse, to renew the agreement once the defendant's position-and his constitutional protection—is vanquished. See Sol.Gen.Br. 21 n.11. Although this is a context different from that in which the Court has spoken before, if the Double Jeopardy Clause stands as a general barrier against "the prosecutor . . . using the superior resources of the state to harass or achieve a tactical advantage over the accused" by the threat of repeated trials, Arizona v. Washington, 434 U.S. 497, 508 (1978), it should stand against this.

A final policy of the Double Jeopardy Clause—to prevent the State from "subjecting [the defendant] . . . to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity," Green v. United States, supra, 355 U.S. at 187-is similarily implicated by this case. The "embarrassment, expense, and ordeal" to which John Adamson was put did not, admittedly, arise out of repeated criminal trials in which he was the defendant, but he experienced them nonetheless. Mr. Adamson's first trial ended only after he admitted guilt of murder in open court, waived his constitutional trial rights, and entered into extensive obligations for future testimony on behalf of the State. He escaped a death sentence through a process similar in many respects to an Arizona capital trial: the trial judge reviewed the factual record and a pre-sentence report, as well as the plea agreement and Mr. Adamson's admissions, before determining that the recommended prison sentence under the plea bargain was "appropriate." JA 38-43; compare Arizona v. Rumsey, supra, 467 U.S. at 205-206. Then, for two years, Mr. Adamson underwent an "ordeal" more protracted than most criminal defendants experience in their own trials: seemingly endless examination and cross examination in the cases in which he had promised to testify, accompanied by threats to his life from those he testified against and the threat of reprosecution and a death sentence from the State if he was ever found untruthful.39 It was his understanding

³⁹ At his final sentencing, Mr. Adamson recounted the history of his testimony as follows:

I have been cross-examined under oath for approximately 190

that the ordeal ended when he was sentenced—with the single, possible exception that the State of Arizona might still initiate prosecution of the Ashford Plumbing case. The Court of Appeals' opinion here properly understood that the policies behind the Double Jeopardy Clause were designed to provide a criminal defendant just such a final refuge from governmental exactions of payment for his crime, a refuge that does not vanish simply because he tries to assert it.

In no fair sense can it be said that Mr. Adamson attempted here "to use the Double Jeopardy Clause as a sword...." Sol. Gen. Br. at 25, quoting Ohio v. Johnson, 467 U.S. 493, 592 (1984). Mr. Adamson did not attempt "to prevent the state from completing its prosecution on the ... charges" against him. Ibid. He simply asserted that prosecution was complete, as both the plea agreement and the Double Jeopardy Clause seemed to say it should be, when he was sentenced. In the most literal sense, he invoked the Double Jeopardy Clause as the shield it was intended to be: a protection against the State's use of the

hours by some of the most brilliant legal minds in the country and some of the most skilled in the art of cross-examining. In all I have been examined and cross-examined and reexamined by 22 different attorneys, ten defense attorneys of the likes of Percy Foreman, John Flynn, Paul Smith, seven state and local prosecutors, five federal prosecutors.

Totally 21 investigators have also examined, reexamined, and cross-examined me, five Alcohol and Tobacco Firearms Agents, two Drug Enforcement Administration Agents, five Federal Bureau of Investigations Agents, five Phoenix Police Department Organized Crime and Intelligence Agents—or detectives, excuse me, two City of Phoenix bomb experts, and two homicide detectives from a midwest location.

In total, Your Honor, I have cooperated in approximately 205 interrogative sessions which have been conducted to date. Fifty-five of these have been formal face-to-face in-depth question and answer sessions, approximately.

JA 150-151.

I have now made 14 court appearances to date on five separate cases consisting of approximately 31 days of testimony. These cases have been heard by eight different Judges, three of them Federal Judges and one Federal Magistrate. Of the 81 or so jurors who have heard my testimony all have returned guilty verdicts in each case resulting in seven convictions.

constant threat of reprosecution to compel his unending obedience to its every demand.

Nothing about the Court of Appeals' recognition that the Double Jeopardy Clause does provide this protection reduces the utility of plea agreements to secure accomplice testimony for the government, let alone "renders plea agreements . . . almost entirely unenforceable by the government" Sol.Gen.Br. 24. All the government needs to do to make sure its agreements are enforceable is what most prosecutors already do in these situations: arrange for the defendant's sentencing to follow his or her testimony. 40 If that is for some reason impractical, all that is required is a simple expedient, which, we certainly believe, is not "beyond the capability of most attorneys" (Sol.Gen.Br. at 25), who have any experience in criminal prosecution: "[t]he agreement could . . . address[] the waiver issue, specifically." JA 192.

The agreement here clearly addressed the waiver of the other constitutional rights it implicated. JA 199. Similar waivers have been written into even routine guilty pleas since Boykin v. Alabama, supra. Since Mr. Adamson's case, such explicit waivers of double jeopardy rights have been reported in Arizona plea agreements as well. See e.g., Dominiquez v. Mehan, 681 P.2d 912, 914 (Ariz. 1983).

Such specificity would not undermine, but enhance, "predictability and reliance" Sol.Gen.Br. at 24. It would create no threat that the defendant will get "more than 'the benefit of his bargain'" (ibid.); it simply would ensure that the defendant will know, exactly, what his "bargain" entails, and when his jeopardy will end. The Court of Appeals did not err by holding John Adamson was entitled to know that.

To the extent that concerns about the government's ability to obtain witnesses' cooperation through plea bargaining are relevant here, they strongly favor the Court of Appeals' position. If this Court holds that years of truthful cooperation with the government, and a sentence solemnly pronounced and partly served, can be swept away, to count for nothing, by a single hesitation, it will make plea agreements for testimony Faustian pacts, indeed. If the State of Arizona is permitted to put John Adamson to death, because he balked once—after he has surrendered his right to trial, testified for the prosecution over and over, and made clear his willingness to do so again—it will be a rare defense lawyer who will advise a client to follow his example and cooperate with the government in a major criminal prosecution.

We cannot believe the Court will find any "policy" favoring plea agreements for cooperation will be fostered by sanctioning such an imbalance of power between the State and its defendant-witnesses. Rather, as the Court has

⁴⁰ The prevalence of this practice is evident from even a cursory survey of the federal cases which discuss such plea agreements in different contexts. See e.g., United States v. Verrusio, 803 F.2d 885 (7th Cir. 1986); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986); United States v. Waterman, 732 F.2d 1527 (8th Cir. 1984); Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983); Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983); Williams v. Brown, 609 F.2d 216 (5th Cir. 1980); United States v. Barnham, 595 F.2d 231 (5th Cir. 1979); Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979); United States v. Davis, 582 F.2d 947 (5th Cir. 1979); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976); Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977); United States v. Figurski, 545 F.2d 389 (4th Cir. 1976); United States v. Simmons, 537 F.2d 1260 (4th Cir. 1976); United States v. Solimine, 536 F.2d 703 (6th Cir. 1976); United States v. Acosta, 526, F.2d 670 (5th Cir. 1976); United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973); United States v. Fontenot, 483 F.2d 315 (5th Cir. 1973); United States v. Tashman, 478 F.2d 129 (5th Cir. 1973); United States v. Madonna, 556 F.Supp. 260 (S.D.N.Y. 1982); Blanton v. Blackburn, 494 F.Supp. 895 (M.D. Alabama 1980), aff'd 654 F.2d 719 (5th Cir. 1981); Kirchellis v. Long, 425 F.Supp. 505 (S.D.Ala. 1976).

recognized before, the environment in which the government seeks cooperation must include "safeguards to ensure the defendant what is reasonably due in the circumstances." Santobello v. New York, supra, 404 U.S. at 262. The Double Jeopardy Clause is one of those safeguards. No rational or fair "policy" in the administration of criminal justice would be furthered by holding its protections were suspended here.

CONCLUSION

The Court of Appeal's decision should be affirmed.

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